This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

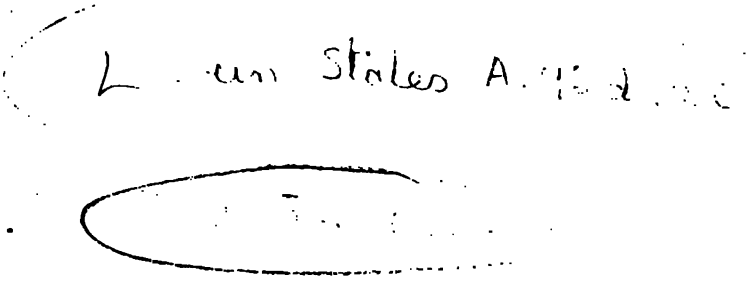
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at http://books.google.com/

cr



L. un States A. [illegible]

USA
100
26

REPORTS

OF

CASES ARGUED AND ADJUDGED

IN

THE SUPREME COURT

OF

THE UNITED STATES.

JANUARY TERM, 1828.

By RICHARD PETERS Junior,

COUNSELLOR AT LAW, AND REPORTER OF THE DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

VOL. I.

PHILADELPHIA:

PHILIP H. NICKLIN, LAW BOOKSELLER.

T. B. BAILEY, PRINTER.

1828.

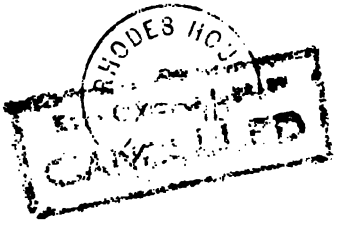
EASTERN DISTRICT OF PENNSYLVANIA, to wit:

(L. S.) BE IT REMEMBERED, That on the sixteenth day of June, in the fifty-second year of the Independence of the United States of America, A. D. 1828, RICHARD PETERS JUNIOR, Esquire, of the said District, has deposited in this office the Title of a Book, the right whereof he claims as Proprietor, in the words following, to wit:

"Reports of Cases argued and adjudged in the Supreme Court of the "United States. January Term, 1828. By RICHARD PETERS JUNIOR, Coun- "sellor at Law, and Reporter of the Decisions of the Supreme Court of the "United States. Vol. I."

In conformity to the Act of the Congress of the United States, intituled, "An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned." And also to the Act, entitled, "An Act supplementary to an Act, entitled, 'An Act for the encouragement of learning, by securing the copies of maps, charts, and books, to the authors and proprietors of such copies, during the times therein mentioned,' and extending the benefits thereof to the arts of designing, engraving, and etching, historical and other prints."

D. CALDWELL, *Clerk of the Eastern District of Pennsylvania.*



THE official duties of the Subscriber, requiring his residence annually in *the City of Washington*, during the whole Session of the Supreme Court, in the months of January, February, and March, he will attend to professional business in the Court. He will also have it in his power to attend to claims upon the Departments of the Government, and such as require the aid of the National Legislature; and he tenders his services for those purposes.

During the Term of the Court, as an act of professional comity, he will, on application by mail, most willingly give any information to Counsel of the state of the Docket, or of Cases in which they may be interested.

At all other periods, except during the Session of the Court, his address is this City.

RICHARD PETERS JR.

Philadelphia, June 23, 1828.

PREFACE.

The volume of Reports now published, contains the cases decided in the Supreme Court of the United States, during the January Term, 1828.

In the execution of the trust committed to him, it has been the earnest endeavour of the Reporter, to exhibit the facts of each case presented to the Court, briefly and accurately; and to state such of the arguments of counsel, as, in his opinion, were required for a full and correct understanding of the important points of the case, and the decision of the Court. He solicits the indulgence of his brethren of the profession, for any deficiencies in this part of the work. It has not been within the scope of his purpose, to give, at large, all the reasoning and learning addressed by them to the Court.

It is freely admitted, that this volume is issued from the press, under an anxious solicitude for its favourable reception. As it is the first of a series to be published by the Reporter, while holding the station assigned to him by the kind consideration of the Court; he is most desirous that it shall obtain, what will be deemed by all, the highest sanction; the approbation of those whose enlightened and learned labours, it is the object of the work to record.

In the statement of the points decided in each case, a plan, somewhat novel, has been adopted. The syllabus of each case, contains an abstract of all the matters ruled and adjudged by the Court, and, generally, in the language of the decision, with a reference to the page of the Report

in which the particular point will be found. As many of the cases occupy a considerable space, this mode of reference will be found convenient, to the practitioner, and to the student.

It is held to be obligatory on the Reporter, under the provision of the Act of Congress, which declares that "the decisions of the Court shall be sold to the public at large, at a price not exceeding five dollars per volume," to stipulate with the publisher, that the price, per volume, shall be that sum. This has been done.

RULES AND ORDERS

OF THE

SUPREME COURT OF THE UNITED STATES.

The Office of the Clerk to be kept at the seat of Government, and the Clerk not to practice. {i}

Admission of Attorneys and Counsellors. {ii}

Counsellors not to practice as Attorneys, &c. {iii}

Oath or affirmation of Counsellors, and Attorneys. {iv–vi}

All process in the Court, to be issued in the name of the President of the United States. {v}

The practice of the Court of King's Bench and Chancery, of England, the outlines of the practice of the Court. {vii}

Evidence required on motions for the discharge of bail. {ix}

Service of a subpœna in Equity suits, and proceedings afterwards. {x}

Form of returns to writs of error. {xi}

No records to go out of the Clerk's Office, or from the Court Room. {xii, xxxiv}

Affidavits may be taken of the value of the matter in controversy in a suit. {xiii}

Counsellors may be admitted as Attorneys. {xiv}

Plaintiff may proceed *ex parte*, when defendant fails to appear. {xv}

Defendant may proceed, when writ of error issues thirty days before the meeting of the Court. {xvi}

Rates of damages to be allowed by the Court. {xvii, xviii}

Rules as to trials and continuances. {xix, xxxi}

Proceedings where the writ of error is a *supersedeas*. {xix}

Assignment of errors, and putting cases at issue. {xix}

Security for costs. {xx}

Proceedings to enforce payment of costs. {xxi}

Costs upon reversal. {xxii}

But two Counsel shall be allowed to argue for each party. {xxiii}

Proceedings upon order for further proof. {xxiv}

Original papers, when to be sent up with the record. {xxv}

Mode of taking new evidence. {xxvi}

No case shall be heard, until a printed brief shall have been furnished to the Court by Counsel. {viii. xxvii}

Proceedings where either party dies pending a writ of error. {xxviii}

When cases shall be docketed, and the records filed. Proceedings in the failure to do this. {xxix}

No cause shall be heard, until a complete record shall be filed. {xxx}

Motion for a *certiorari* for diminution of the record. {xxxi}

Exceptions to evidence, in Admiralty and Equity cases. {xxxii}

Motions not required by the rules of the Court to be put on the docket, when to be made. {xxxiii}

I. *Ordered*, That the clerk of this Court, do reside and keep his office at the seat of the National Government, and that he do not practice, either as an attorney or a counsellor, in this Court, while he shall continue to be clerk of the same.

February Term 1790.

II. *Ordered*, That (until farther order,) it be requisite to the admission of attorneys, or counsellors, to practice in this Court, that they shall have been such for three years past in the Supreme Courts of the state to which they respectively belong; and that their private and professional characters shall appear to be fair. *February Term* 1790.

III. *Ordered*, That counsellors shall not practice as attorneys, nor attorneys as counsellors, in this Court.
February Term 1790.

IV. *Ordered*, That they shall respectively take the following oath, viz. I, do solemnly swear, that I will demean myself, (as an attorney or counsellor of the Court) uprightly, and according to law, and that I will support the Constitution of the United States. *February Term* 1790.

V. *Ordered*, That (unless, and until it shall be otherwise provided by law,) all process in this Court, shall be in the name of the President of the United States.
February Term 1790.

VI. *Ordered*, That the counsellors and attorneys admitted to practice in this Court, shall take either an oath, or in proper cases an affirmation, of the tenor prescribed by the rule of this Court on this subject, made at the February term 1790, viz. I, do solemnly swear, (or affirm, as the case may be,) that I will demean myself, as attorney or counsellor of this Court, uprightly, and according to law, and that I will support the Constitution of the United States. *February Term* 1791.

VII. The Chief Justice, in answer to the motion of the Attorney-General, informs him, and the bar; that this Court consider the practice of the Court of King's Bench and of Chancery, in England, as affording outlines for the practice of this Court; and that they will, from time to time, make such alterations therein as circumstances may render necessary.
August Term 1791.

VIII. The Court give notice to the gentlemen of the bar, that hereafter they will expect to be furnished with a statement of the material points of the case, from the counsel on each side of the cause. *February Term* 1795.

IX. The Court declared, That all evidence on motions for a discharge upon bail, must be by way of deposition, and not *viva voce*. *February Term* 1795.

X. *Ordered*, That process of subpœna, issuing out of this

Court, in any suit in equity, shall be served on the defendant sixty days before the return day of the said process; and farther, that if the defendant, on such service of the subpœna, should not appear at the return day contained therein, the complainant shall be at liberty to proceed *ex parte*.
August Term 1796.

XI. It is *ordered* by the Court, That the clerk of the Court to which any writ of error shall be directed, may make return of the same, by transmitting a true copy of the record, and of all proceedings in the cause, under his hand and the seal of the Court. *February Term* 1797.

XII. It is *ordered* by the Court, That no record of the Court be suffered by the clerk to be taken out of his office, but by the consent of the Court; otherwise to be responsible for it.
August Term 1797.

XIII. *Ordered*, That the plaintiff in error be at liberty to show, to the satisfaction of this Court, that the matter in dispute exceeds the sum or value of 2000 dollars, exclusive of costs; this to be made to appear by affidavit, and days' notice to the opposite party, or their counsel, in Georgia. Rule as to affidavits to be mutual. *August Term* 1800.

XIV. *Ordered*, That counsellors may be admitted as attorneys in this Court, on taking the usual oath.
August Term 1801.

XV. It is *ordered*, That in every cause, when the defendant in error fails to appear, the plaintiff may proceed *ex parte*.
August Term 1801.

XVI. It is *ordered*, That where the writ of error issues within thirty days before the meeting of the Court, the defendant is at liberty to enter his appearance, and proceed to trial; otherwise the cause must be continued. *February Term* 1803.

XVII. In all cases where a writ of error shall delay the proceedings on the judgment of the Circuit Court, and shall appear to have been sued out merely for delay, damages shall be awarded at the rate of ten per centum per annum, on the amount of the judgment. *February Term* 1803.

XVIII. In such cases, where there exists a real controversy, the damages shall be only at the rate of six per centum per annum. In both cases the interest is to be computed as part of the damages. *February Term* 1803.

XIX. All causes, the records of which shall be delivered to the clerk on or before the sixth day of the term, shall be considered as for trial in the course of that term. Where the record shall be delivered after the sixth day of the term, either party will be entitled to a continuance.

In all cases where a writ of error shall be a *supersedeas* to a judgment, rendered in any Court of the United States, (except that for the District of Columbia,) at least thirty days previous to the commencement of any term of this Court, it shall be the duty of the plaintiff in error to lodge a copy of the record with the clerk of this Court, within the first six days of the term; and if he shall fail to do so, the defendant in error shall be permitted, afterwards, to lodge a copy of the record with the clerk, and the cause shall stand for trial, in like manner as if the record had come up within the first six days; or he may, on producing a certificate from the clerk, stating the cause, and that a writ of error has been sued out, which operates as a *supersedeas* to the judgment, have the said writ of error docketed and dismissed. This rule shall apply to all judgments rendered by the Court for the District of Columbia, at any time prior to a session of this Court.

In cases not put to issue at the August term, it shall be the duty of the plaintiff in error, if errors shall not have been assigned in the Court below, to assign them in this Court, at the commencement of the term, or so soon thereafter as the record shall be filed with the clerk, and the cause placed on the docket; and if he shall fail to do so, and shall also fail to assign them when the cause shall be called for trial, the writ of error may be dismissed at his cost; and if the defendant shall refuse to plead to issue, and the cause shall be called for trial, the Court may proceed to hear an argument on the part of the plaintiff, and to give judgment according to the rights of the cause. *February Term* 1806.

XX. *Ordered*, That all parties in this Court, not being residents of the United States, shall give security for the costs accruing in this Court, to be entered on the record.

February Term 1808.

XXI. *Ordered*, That upon the clerk of this Court producing satisfactory evidence by affidavits, or the acknowledgment of the parties, or their sureties, of having served a copy of the bill of costs, due by them respectively in this Court, on such parties or their sureties, an attachment shall issue against such parties or sureties respectively, to compel payment of the said costs. *February Term* 1808.

XXII. *Ordered*, That upon the reversal of a judgment or

decree of the Circuit Court, the party in whose favour the reversal is, shall recover his costs in the Circuit Court.
February Term 1810.

XXIII. *Ordered*, That only two counsel be permitted to argue for each party, plaintiff and defendant, in a cause.
February Term 1812.

XXIV. It is *ordered* by the Court, That in all cases where farther proof is ordered by the Court, the depositions which shall be taken, shall be by a commission to be issued from this Court, or from any Circuit Court of the United States.
February Term 1816.

XXV. Whenever it shall be necessary or proper, in the opinion of the presiding Judge in any Circuit Court, or District Court exercising Circuit Court jurisdiction, that original papers of any kind should be inspected in the Supreme Court upon appeal, such presiding Judge may make such rule or order for the safe keeping, transporting, and return, of such original papers, as to him may seem proper; and this Court will receive and consider such original papers in connexion with the transcript of the proceedings. *February Term* 1817.

XXVI. In all cases of admiralty and maritime jurisdiction, where new evidence shall be admissible in this Court, the evidence by testimony of witnesses, shall be taken under a commission, to be issued from this Court, or from any Circuit Court of the United States, under the direction of any Judge thereof; and no such commissions shall issue, but upon interrogatories to be filed by the party applying for the commission, and notice to the opposite party, or his agent or attorney, accompanied with a copy of the interrogatories so filed, to file cross interrogatories, within twenty days from the service of such notice. *Provided*, however, that nothing in this rule shall prevent any party from giving oral testimony in open Court, in cases where by law it is admissible.
February Term 1817.

XXVII. After the present Term, no cause standing for argument will be heard by the Court, until the parties shall have furnished the Court with a printed brief, or abstract of the cause, containing the substance of all the material pleadings, facts and documents, on which the parties rely, and the points of law and fact, intended to be presented at the argument.
February Term 1821.

XXVIII. Whenever, pending a writ of error, or appeal in this

Court, either party shall die, the proper representatives in the personalty or realty of the deceased party, according to the nature of the case, may voluntarily come in and be admitted parties to the suit, and thereupon the cause shall be heard and determined, as in other cases; and if such representatives shall not voluntarily become parties, then the other party may suggest the death on the record; and thereupon, on motion, obtain an order, that, unless such representatives shall become parties, within the first ten days of the ensuing term, the party moving for such order, if defendant in error, shall be entitled to have the writ of error or appeal dismissed; and if the party so moving, shall be plaintiff in error, he shall be entitled to open the record, and, on hearing, have the same reversed, if it be erroneous. *Provided*, however, that a copy of every such order shall be printed in some newspaper, at the seat of government, in which the laws of the United States shall be printed by authority, three successive weeks, at least sixty days before the beginning of the Term of the Supreme Court, then next ensuing. *February Term* 1821.

XXIX. In all cases where a writ of error, or an appeal shall be brought to this Court, from any judgment or decree rendered thirty days before the term to which such writ of error or appeal shall be returnable, it shall be the duty of the plaintiff in error, or appellant, as the case may be, to docket the cause, and file the record thereof, with the clerk of this Court, within the first six days of the term; on failure to do which, the defendant in error, or appellee, as the case may be, may docket the cause, and file a copy of the record with the clerk, and thereupon the cause shall stand for trial, in like manner as if the record had been duly filed within the first six days of the term; or, at his option, he may have the cause docketed and dismissed, upon producing a certificate from the clerk of the Court, wherein the judgment or decree was rendered, stating the cause, and certifying, that such writ of error or appeal had been duly sued out and allowed. *February Term* 1821.

XXX. No cause will hereafter be heard, until a complete record shall be filed, containing in itself, without references, *aliunde*, all the papers, exhibits, depositions, and other proceedings, which are necessary to the hearing in this Court.
February Term 1823.

XXXI. No *certiorari* for diminution of the record, shall be hereafter awarded in any cause, unless a motion therefor shall be made in writing, and the facts on which the same is founded, shall, if not admitted by the other party, be verified by affidavit. And all motions for such *certiorari*, shall be made at the

first term of the entry of the cause, otherwise, the same shall not be granted, unless upon special cause shown to the Court, accounting satisfactorily for the delay. *January Term* 1824.

XXXII. In all cases of equity and admiralty jurisdiction, heard in this Court, no objection shall hereafter be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record, as evidence, unless objection was taken thereto in the Court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent. *February Term* 1825.

XXXIII. On Saturday of each week, during the sitting of the Court, motions in cases not required by the rules of Court to be put upon the docket, shall be entitled to preference, if such motions shall be made before the Court shall have entered upon the hearing of a cause upon the docket.

February Term 1825.

XXXIV. *Ordered*, That after the present term, no original record shall be taken from the Supreme Court Room, or from the office of the clerk of this Court.

February Term 1825.

There having been one associate justice of the Supreme Court appointed since its last session,—It is *ordered*, That the following allotment be made of the Chief Justice and the associate justices of the said Supreme Court among the Circuits, agreeably to the Act of Congress in such cases made and provided:—

For the First Circuit—The Hon. Joseph Story.
For the Second Circuit—The Hon. Smith Thompson.
For the Third Circuit—The Hon. Bushrod Washington.
For the Fourth Circuit—The Hon. Gabriel Duval.
For the Fifth Circuit—The Hon. John Marshall, *Ch. Justice.*
For the Sixth Circuit—The Hon. William Johnson.
For the Seventh Circuit—The Hon. Robert Trimble.

January Term 1827.

LIST OF CASES.

A.

Page

ALEXANDER ET AL. vs. BROWN, - - - - 683
American Insurance Company, vs. Bales of Cotton, Canter, claimant, - - - - - - - - 511
Anderson's lessee vs. Clark et al. - - - - 628
Archer et al. Executors of Stump, vs. Deneale et al. 585
Atlantic Insurance Company, Conard vs. - - - 386

B.

Baker et al. Horsburg vs. - - - - - 232
Bank of Columbia vs. Hagner, - - - - 455
Bank of Columbia vs. Lawrence, - - - - 578
Bank of Columbia vs. Sweeny, - - - - 567
Bank of the Metropolis, Brent's Executors vs. - 89
Bank of Georgia, Breithaupt et al. vs. - - - 238
Bank of the United States, Fullerton et al. vs. - - 604
Bank of Washington vs. Triplett & Neale, - - 25
Bank of the United States vs. Stansbury et al. - - 575
Barland, Ross, vs. - - - - - - - - 655
Barry vs. Coombe, - - - - - - - - 640
Barry vs. Foyles, - - - - - - - - 311
Bayard et al. Konig vs. - - - - - - 250
Bayard et al. Schimmelpennich et al. vs. - - 264
Bell vs. Morrison et al. - - - - - - 351
Belt et al. Pray et al. vs. - - - - - - 670
Biddle, Administrator, vs. Wilkins, - - - - 686
Breithaupt et al. vs. The Bank of Georgia, - - 238
Brent's Executors vs. The Bank of the Metropolis, - 89
Brown, Alexander et al. vs. - - - - - 683
Buck & Hedrick vs. The Chesapeake Insurance Company, 151

C.

Canter, claimant of cotton, The American Insurance Company vs. - - - - - - - - - 511
Carroll vs. Peake, - - - - - - - - 18

Page

Casks of Wine, Hazzard & Williams, claimants, The United States vs. - - - - - - - - - 547
Chesapeake Insurance Company, Buck & Hedrick vs. 151
Clark et al. Jackson, ex-devisee of Anderson et al. vs. 628
Comegys vs. Vasse, - - - - - - - - 193
Conard vs. The Atlantic Insurance Company, - - 386
Coombe, Barry vs. - - - - - - - - - 640
Cotton, Bales of, American Insurance Company vs. - 511

D.

Davis et al. vs. Mason's lessee, - - - - 503
Deneale et al. Stump's Executors vs. - - - 585
D'Wolf vs. Rabaud et al. - - - - - 476
Dox et al. vs. The Postmaster-General, - - - 318

E.

Elliott et al. vs. Peirsol et al. - - - - - 328
Elmore et al. vs. Grymes et al. - - - - 469

F.

Farmers & Mechanics Bank of Georgetown, Gaither vs. 37
Ferrer et al. Karthaus vs. - - - - - 222
Findlay et al. vs. Hinde & Wife, - - - - 241
Foyles, Barry vs. - - - - - - - - 311
Fullerton et al. vs. The Bank of the United States, - 604

G.

Gaither vs. The Farmers & Mechanics Bank of Georgetown, - - - - - - - - - - - 37
Governor of Georgia vs. Madrazo, - - - - 110
Greenleaf vs. Queen et al. Heirs, and Wallack, Administrator of Boyd, - - - - - - - - 138
Grymes et al. Elmore et al. vs. - - - - 469

H.

Hagner, The Bank of Columbia vs. - - - 455
Hickie vs. Starke et al. - - - - - - 94
Hinde & Wife, Findlay et al. vs. - - - - 241
Hodges' Executors, Nicholls et al. vs. - - - 562
Hollingsworth's lessee, Wright vs. - - - - 165
Horsburg vs. Baker et al. - - - - - 232
Hunt vs. Rousmaniere's Administrators, - - - 1

J.

Jackson on the demise of Anderson vs. Clarke et al. - 628
Jackson et al. Waring vs. - - - - - 570

K.

Page
Karthaus vs. Ferrer et al. - - - - - - 222
Konig vs. Bayard et al. - - - - - - 250

L.

Lawrence, Bank of Columbia vs. - - - - 578
Lessee of Hollingsworth et al. Wright et al. vs. - 165
Lynn, The Mechanics Bank of Alexandria vs. - - 376

M.

Madrazo, The Governor of Georgia vs. - - - 110
Mandeville vs. Suckley et al. - - - - - 136
Mason's Lessee, Davis et al. vs. - - - - 503
M'Arthur vs. Porter's Lessee, - - - - - 626
M'Donald vs. Smalley et al. - - - - - 620
M'Kee for the use, &c. Old Grant, Lessee of Meredith et al. vs. - - - - - - - - - 248
M'Lanahan et al. vs. The Universal Insurance Company, 170
Mechanics Bank of Alexandria vs. Lynn, - - 376
Mechanics Bank of Alexandria, Minor et al. vs. - 46
Mechanics Bank of Alexandria vs. Setons, - - 299
Minor et al. vs. The Mechanics Bank of Alexandria, 46
Morrison et al. Bell vs. - - - - - - 351

N.

Nicholls et al. vs. Hodges' Executors, - - - 562

O.

Old Grant on the demise of Meredith vs. M'Kee, - 248

P.

Parker vs. The United States, - - - - 293
Peake, Carroll vs. - - - - - - - 18
Peirsol et al. Elliott et al. vs. - - - - - 328
Porter's Lessee, M'Arthur vs. - - - - - 626
Postmaster-General, Dox et al. vs. - - - - 318
Pray et al. vs. Belt et al. - - - - - - 670

Q.

Queen et al. Heirs, and Wallack, Administrator, of Boyd, Greenleaf vs. - - - - - - - - 138

R.

Rabaud et al. D'Wolf vs. - - - - - - 476
Rhea et al. vs. Rhenner, - - - - - - 105
Rhenner, Rhea et al. vs. - - - - - - *ib.*

R.

	Page
Riggs, Tayloe vs.	591
Ross vs. Doe on the demise of Barland et al.	655
Rousmaniere's Administrators, Hunt vs.	1

S.

Saline Bank of Virginia, The United States vs.	100
Schimmelpennich et al. vs. Bayard et al.	264
Setons, The Mechanics Bank of Alexandria vs.	299
Smalley et al. M'Donald vs.	620
Spencer, Steele's Lessee vs.	552
Spratt et al. vs. Spratt,	343
Spratt, Spratt et al. vs.	343
Stansbury et al. The United States vs.	573
Starke et al. Hickie et al. vs.	94
Steele's Lessee vs. Spencer,	552
Suckley et al. Mandeville vs.	136
Sweeny, Bank of Columbia, vs.	567

T.

Tayloe vs. Riggs,	591
Triplett & Neale, The Bank of Washington vs.	25

U.

United States vs. The Saline Bank of Virginia,	100
United States vs. 422 Casks of Wine, Hazzard & Williams, claimants,	547
United States, Parker vs.	293
United States vs. Stansbury et al.	573
Universal Insurance Company, M'Lanahan et al. vs.	170

V.

Vasse, Comegys et al. vs.	193

W.

Waring vs. Jackson et al.	570
Wilkins, Biddle Administrator vs.	686
Wright et al. vs. The Lessee of Hollingsworth et al.	165

SUPREME COURT OF THE UNITED STATES.

The Hon. JOHN MARSHALL, Chief Justice.
The Hon. BUSHROD WASHINGTON, Associate Justice.
The Hon. WILLIAM JOHNSON, Associate Justice.
The Hon. GABRIEL DUVAL, Associate Justice.
The Hon. JOSEPH STORY, Associate Justice.
The Hon. SMITH THOMPSON, Associate Justice.
The Hon. ROBERT TRIMBLE, Associate Justice.

WILLIAM WIRT, Esq. Attorney-General of the United States.

WILLIAM THOMAS CARROLL, Esq. Clerk of the Supreme Court of the United States.

TENCH RINGOLD, Esq. Marshal.

The following Gentlemen were admitted to practice at the Bar of the Supreme Court of the United States, at January Term, eighteen hundred and twenty-eight.

Saml. A. Foot,	New-York.
Daniel J. Caswell,	Ohio.
Edw. Bates, M. C.	Missouri.
Peleg Sprague, M. C.	Maine.
Oliver H. Smith, M. C.	Indiana.
David Woodcock, M. C.	New-York.
J. B. Sutherland, M. C.	Pennsylvania.
James Bayard,	Pennsylvania.
Ethan Baldwin,	Pennsylvania.
Charles B. Goddard,	Ohio.
Richard Biddle,	Pennsylvania.
Thomas Ewing,	Ohio.
John Whipple,	Rhode Island.
G. O. Beldin, M. C.	New-York.
Henry J. Williams,	Pennsylvania.
Theodore Sedgwick Fisk,	New-York.
Joseph S. Benham,	Ohio.
Benjamin Gorham, M. C.	Massachusetts.
Henry Baldwin,	Pennsylvania.
James Dunlap,	District of Columbia.
Wm. Creighton, jun. M. C.	Ohio.
Francis R. Tillon,	New-York.
Ogden Hoffman,	New-York.
Charles C. King,	New-York.
Edward Kimball,	Massachusetts.
Humphrey Atherton,	Pennsylvania.
David Paul Brown,	Pennsylvania,
Christopher Ellery Robbins,	Rhode Island.
William Ironside,	New-York.
John S. Tyson,	Maryland.

THE DECISIONS

OF THE

SUPREME COURT OF THE UNITED STATES,

AT

JANUARY TERM, 1828.

CLEMENT S. HUNT, APPELLANT, *vs.* CHRISTOPHER RHODES, WILLIAM ENNIS, AND RICHARD K. RANDOLPH, ADMINISTRATORS OF LEWIS ROUSMANIERE, DECEASED, APPELLEES.

It is a principle of equity, that, when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman, either in fact or in law, does not fulfil, or which violates the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. {13}

The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a Court of Equity will compel a delinquent party to perform his agreement, according to the terms of it, and to the manifest intention of the parties. {13}

So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact; a Court of Equity will, in general, grant relief, according to the nature of the particular case in which it is sought. {13}

If an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, it would be unprecedented, for a Court of Equity to decree another security to be given, different from that which had been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed. {14}

Courts of Equity may compel parties to execute their agreements, but it has no power to make agreements for them. The death of one of the parties, and the consequent inefficiency of the security selected, intended to be valid and complete, but which was not so, will not give the right of interference. {14}

(Hunt *vs.* Rousmaniere's Adm.)

A mistake arising from ignorance of law, is not a ground for reforming a deed founded on such mistake; except in some few cases, and those of peculiar characters. {15}

If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. {16}

It seems, that there may be cases in which a Court of Equity will relieve against a plain mistake, arising from ignorance of law. But where parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected; a Court of Equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not forseen; direct a security of a different character to be given, or decree that to be done, which the parties supposed would have been effected by the instrument, which was finally agreed upon. The Court would be much less disposed to interfere in such a case, in favour of a particular creditor, against the general creditors of an insolvent estate. {17}

THE appellant filed a bill on the Chancery side of the Circuit Court of the United States, for the district of Rhode Island, setting forth, that, in January 1820, Lewis Rousmaniere obtained from him two loans of money, amounting, together, to 2150 dollars; and, at the time the first loan was made, Rousmaniere offered to give, in addition to his notes, a bill of sale, or mortgage of his interest, in the brig Nereus, then at sea, as a collateral security for the repayment of the money. A few days after the delivery of the first note, dated 11th of January 1820, he executed a power of attorney, authorizing the plaintiff to make and execute a bill of sale, of three-fourths of the Nereus, to himself, or to any other person; and in the event of the loss of the vessel, to collect the money which should become due, on a policy, by which the vessel and freight were insured. In the power of attorney it was recited, that it was given as collateral security for the payment of the notes, and was to be void on their payment; on the failure of which, the plaintiff was to pay the amount and all expenses, and to return the residue to Rousmaniere. On the 21st of March 1821, an additional sum of 700 dollars was loaned, for which a note was taken, and similar power of attorney given, to sell his interest in the schooner Industry; this vessel being also still at sea.

On the 6th of May 1820, Rousmaniere died intestate and insolvent, having paid 200 dollars on account of the notes; and the plaintiff gave notice of his claim, to the Commissioners of Insolvency, appointed under the authority of the Insolvent Law of Rhode Island. The plaintiff in his bill alleged, that, on the return of the Nereus and Industry, he took pos-

session of them, and offered the interest of the intestate in them. for sale; and the defendants having forbade the sale, this bill was brought to compel them to join in it.

To this bill the defendants demurred; and their demurrer was sustained in the Circuit Court; but leave was given to the plaintiff to amend. An amended bill was then filed, in which it was stated, that it was expressly agreed between the parties, that Rousmaniere was to give specific security on the Nereus and Industry, and that he offered to execute a mortgage on them. Counsel was consulted on the subject, who advised that the power of attorney, which was actually executed, should be taken in preference to a mortgage, because it was equally valid and effectual as a security, and would prevent the necessity of changing the papers of the vessels, or of taking possession of them on their return to port. These securities were, it was alleged, executed with a full belief that they would, and with intention that they should, give to the plaintiff, as full and perfect a security, as would be given by a mortgage.

The defendants having also demurred to the amended bill, the Circuit Court decided in favour of the demurrer, and dismissed the bill; and an appeal was entered to this Court.— At the February session, 1823, this Court considered that the appellant might be entitled to the relief prayed for in Equity, but the respondents were permitted to withdraw their demurrer, and to file an answer in the Court below. 8 *Wheat.* 174. The answer of the defendants admits the loans of money, and the delivery of the promissory notes, and that but two hundred dollars were paid before the death of the intestate. The execution of the powers of attorney was also admitted, but it was denied that possession of the vessels was taken by the appellant; and they alleged their resistance of the attempt to take possession of them.

The answer also asserts ignorance of any agreement for a specific lien on the vessels, except that imported by the language of the powers of attorney; that they had heard and believed that the appellant meant to be concerned, as a partner, in the voyage of one of the vessels, which was relinquished, and that afterwards he offered to loan the money on security; upon which the intestate offered to give a mortgage, but the appellant preferred taking the powers of attorney, to avoid inconvenience, and took the powers of attorney, by advice of counsel. The answer also states, that a bill of sale of the vessels, dated the day before the death of the intestate, by which the vessels were intended to be conveyed to one Bateman, and which the respondents state they had heard, and believed was intended to be executed on the evening of that day. The answer also alleges the insolvency of Rousmaniere,

and that it existed a long time before his death; which they assert must have been known to the appellant, and that the intestate resorted to improper modes to keep up his credit.

The evidence taken in the case, consisted of the deposition of Mr. Hazard, the counsel who drew the papers, and in which he stated, that they were intended by both parties to have the effect of a specific lien or mortgage, and he advised them they would have that effect; and also the deposition of Mr. Merchant, to show that the appellant admitted that the motive by which he was induced to make the loan, was to compensate Rousmaniere for the disappointment sustained by his not uniting with him in a voyage of one of his vessels; and, accordingly, an agreement was made, by which the appellant was to let Rousmaniere have a sum of money, and that he was to give a bill of sale of a certain vessel; but that afterwards he refused to take the same, on account of the inconvenience and difficulties which might attend the same; and that he had consulted with Mr. Hazard, upon the subject, who told him, that he could or would draw an irrevocable power of attorney to sell, which would do as well, or words to that effect; and which was accordingly done.

The Circuit Court pronounced a decree, declaring, that the appellant had no specific lien or security upon either of the vessels, and no equity to be relieved respecting them, and dismissing the bill, with costs; from which decree, an appeal was entered to this Court.

On the part of the appellants, it was contended, that the decree ought to be reversed, and a decree entered for the appellant.

That the answers to the bill do not respond to the only material facts in the cause; it being fully proved, that the powers of attorney were intended to have the effect of a specific lien, the appellant is entitled to the relief he seeks, upon the principles laid down in the former decisions of this Court.

The case was argued by Mr. Kimball and Mr. Webster, for the appellant, and by Mr. Wirt, Attorney General, and Mr. Robbins, for the appellees.

For the appellant—

The Court, in concluding their opinion in the former case between these parties, as reported in 8 *Wheat.* 174, use this language:—"We find no case which we think precisely in point, and are unwilling, where the effect of the instrument, the power of attorney, is acknowledged to have been entirely misunderstood by both parties, to say, that a Court of Equity will not grant relief." In the opinion of the Court. the plaintiff having been, in equity, entitled to the relief he prayed for, the principal question now is, one of fact.

It is insisted, that no essential averment in the bill, is contradicted by the answer.

The only real difference between them, relates to the possession of the vessels.

It is not denied, that it was the express agreement and deliberate intention of the parties, that the plaintiff should have a specific security; the defendants only say they are ignorant of this fact.

The testimony of the plaintiff, then, is sufficient to entitle him to a decree, unless the defendants have introduced other facts, that are clearly inconsistent with it.

Admitting the origin of the loan to the intestate, to be such as the appellees say they have *heard*, and *believe* it to be; this may be reconciled with the alleged intention of the parties, that one should give, and the other receive, a specific security.

If the appellant did assign the reasons which the defendants say they have *heard*, and *believe*, he assigned, for not taking a bill of sale, that circumstance does not contradict the testimony of the plaintiff's witness. A refusal to take a specific legal security, surely, does not necessarily exclude an agreement for a specific equitable security. The fact mentioned in the answer, may import simply a reference to a *legal right*, as those stated by the plaintiff's witness, manifestly do to an *equitable right*. There is, then, no contradiction apparent. As to the bill of sale, found among Rousmaniere's papers, it obviously discloses a design to commit a *fraud*.

None of the distinct averments contained in the answer, are in opposition to the allegations of the bill; and none of them, with the exception of the bill of sale, are derived from the personal knowledge of the defendants.

The general rule of equity, therefore, that declares the testimony of a single witness against a *positive averment* of the answer, to be insufficient for a decree in favour of the plaintiff, does not comprehend the present case. It does not apply, where the answer contains no direct denial, nor where the facts stated, are not, or cannot, be within the defendants' own knowledge. But if it did embrace this cause, the answer ought not to prevail against this bill.

Where a single witness, in support of the bill, is corroborated by *circumstances*, it is sufficient for a decree in favour of the plaintiff; and this is the fact in this case. 9 *Cranch*, 160. Clarke's Ex'rs. *vs.* Van Reymsdyk, Cooth *vs.* Jackson. 6 *Ves.* 40. Heffer *vs.* Miller, 2 *Munf.* 43. Walton *vs.* Hobbs. 2 *Atk.* 19, case 17, Hunt *vs.* Ten Eyck. 2 *John. Ch. R.* 92.

The power of attorney was a part of plaintiff's security; and a letter of attorney, that is part of a security, is *irrevocable*. This was so declared, in the former case of Hunt *vs.*

Rousmaniere, also in Walsh *vs.* Whitcomb, in 2 *Esp. N. P. R.* 565.

It has been ruled, that the answer containing the denial, may also contain in itself the circumstances, giving greater credit to a single witness, sufficient for a decree against the defendant. In a case cited by Chancellor Kent, in Hunt *vs.* Ten Eyck, 2 *John. Chancery Reports*, 92; the fact mentioned in the answer, that the plaintiff declined taking a bill of sale, from an unwillingness to have his name appear on the vessel's papers, &c., and took, upon advice of counsel, a letter of attorney in preference, implies of itself, that a specific security was meditated by the parties; and tends to show, that the plaintiff took the power of attorney, on the recommendation or assurance of his legal adviser, that it would constitute a security as effectual as a bill of sale; insuring the advantages, without producing the inconveniences of that conveyance. The circumstances of the appellant declining to take the bill of sale, for the reasons assigned, and that the powers of attorney were intended to give a specific lien, come in aid of the appellant's witness, and he has also an auxiliary in Merchant; evidence, and the *circumstances* altogether, establish the fact, that a *specific security* was designed and agreed upon. It is an elementary principle of equity, that where parties have, by contract, given a right, but have not provided a sufficient remedy, Courts of Equity will interfere.

Where the remedy is void in law, a Court of Equity has decreed not only against simple contract, but against judgment creditors. Burgh *vs.* Francis, cited in Finch *vs.* Earl of Winchester, 1 *P. Wms.* 279, and Taylor *vs.* Wheeler, 2 *Vern.* 564 —case 513.

But there are no judgment creditors here to be affected by a decree in favour of the plaintiff.

M. Fonblanque, in the first volume of his Treatise upon Equity, suggests, in a note, page 38, whether, in the case of Burgh *vs.* Francis, the second incumbrance had not notice of the former incumbrance. But nothing can be collected from the case as reported, in favour of this suggestion. The presumption is entirely the other way. The plaintiff agreed and contracted for a lien on the vessels, and the other creditors of Rousmaniere trusted to his general credit, and are entitled only to what property belonged to him, subject to the lien, which a Court of Equity would have enforced against Rousmaniere himself.

It was the manifest intention of the parties to create a specific lien. But to accomplish their object, they unhappily adopted an instrument, the legal effect of which, they misunderstood. It was a mutual mistake, and this Court appear al-

ready to have decided, that, notwithstanding this mistake in law, the plaintiff is entitled to relief.

The case is one of an agreement between parties, which has not been performed, an agreement for a specific security for a loan of money; this has been proved by the testimony of one witness, corroborated by circumstances, and not denied in the answer. It is not, therefore, within the influence of the principle, which requires something beyond the testimony of one witness, to sustain the allegations of a bill which are denied in the answer. It is a case of mutual errors, as to the law, and not one where parties have run their risks of the law. It is an agreement to lend money, not on a note, but on the vessels; and if the Court would enforce the lien against Rousmaniere, they should do it now, as the creditors are not third persons, but have no other right than he would have if alive.

For the appellees—

The whole of the proceedings, and the decisions of the Court below, upon the case, will be found in 2 *Mason's Rep.* 244. 8 *Wheat.* 174, and 3 *Mason's Rep.* 294. It is now a question between creditors, and is, whether the Court will attach a lien when none existed? It is a case where a party having rejected a security, now avers, and asks the Court to give him the security he refused. The allegations in the bill are denied by the answer, and they are proved by one witness only.

This is insufficient, and such evidence is dangerous, Poole *vs.* Cabanes et al. 8 *T. Rep.* 328. Upon the question, whether the Court will relieve against a mistake in law,—in 2 *Johns. Cases in Chancery*, 51. 60, this was expressly decided not to be within the power of a Court of Equity.

Taking the fact to be as stated by him, the appellant is not entitled to relief.

This Court have decided, in this case, that the agreement made by the appellant with Rousmaniere, created no lien upon the vessels in question, though they intended it should, and thought it would create a lien; that Rousmaniere parted with no title; that the plaintiff acquired none in the vessels. The reason why this decision did not finally dispose of this case, was, that the Court entertained a doubt, whether this intention to create a lien, which was not, in fact, created, did not constitute a ground of relief in the case. And this case stands now to be argued upon this doubt.

The question is, whether a Court of Equity can relieve against a mistake made by the parties in making their contract, not in matter of fact, but in matter of law, and relieve, to the prejudice of a title vested by law in third parties? Whether equity can create a title where none does exist, and destroy a title where one does exist? This is beyond the province and

power of equity; beyond the legitimate power of a sovereign legislator, and can only be done by that despotic power, which is limited only by its own will. If the parties make their agreement, and make it exactly as they intended, and it creates no title, will the Court make the title?

If it should be asked, why a Court of Equity should relieve against a mistake in matter of fact, and not in matter of law, the reason is obvious. When a mistake of fact is committed by the parties, in making their contract, the mistake is corrected, or supposed to be corrected, and the relief is given according to that corrected statement. Equity, then, does what the law would have done, had there been no such mistake. The Court keeps to its office of merely pronouncing the law upon the fact, as it was understood, and meant to be, between the parties. But when a mistake of the law is made by the parties in making their contract, if relief is given, it is given, not upon the fact, as understood and meant by the parties, but upon the conception of the parties as to the legal effect of that fact. No mistake is corrected, or supposed to be corrected, that relief might be given according to law; but the mistake is to stand, and the law is to be bent and accommodated to it. Equity is to consider the law not to be what it is, but what the parties conceived it to be, and to decree relief accordingly.

It is a principle of jurisprudence, that every one in his acts and contracts is presumed to be conversant with the law; or, if ignorant, that he is to be made to abide the consequences. This principle is essential, if not to the existence, at least to the well being of society.

Cited, the case of Lepard *vs.* Vernon, reported 2 *Vezey & Beam*, 51-2-3.

But suppose that a mistake of the law was a general ground of relief, would it avail the plaintiff, in this case? Here is only equity on his side; but on the other, there is law and equal equity combined. And it is a settled principle, that a naked equity, is never to prevail against both law and equity. The appellant never having acquired any title to the vessels, by his agreement, nor by any proceedings under it, has only a naked equity. He parted with his money, trusting to his agreement, as constituting a security therefor, upon the vessels. This is his equity. The title of the vessels being Rousmaniere's, to his death, at his death passed to his legal representatives, who the respondents are. The legal title, then, is in them. His estate being insolvent, is in them as trustees, for his general creditors; and, being greatly insolvent, they are sufferers, as well as the appellant; trusting to his property for their indemnity. In their equity he shares equally with them, and has received it; but by agreement to be without prejudice to this suit.

But from his equity they are excluded. The Court will take notice, that, by the laws of Rhode Island, no priorities or preferences take place among creditors, in the distribution of intestate estates; whether solvent or insolvent.

A naked equity is never to prevail against equal equity, and title, combined.

The respondents are the creditors, for they hold in trust for the creditors. If, then, it were to be admitted, that, if mistake of the law was a principle of relief subject to this limitation, that it does not extend, and cannot be extended, to a stranger to the contract in which the mistake was committed; this case does not come within the principle; for it is excluded by this limitation.

Mr. Justice WASHINGTON delivered the opinion of the Court—

This case was before this Court in the year 1823, and is reported in 8 *Wheaton*, 174, and was then argued at great length, by the counsel concerned in it. After full consideration, it was decided, that the power of attorney, given by Rousmaniere, the intestate, to the appellant, Hunt, authorizing him to make and execute a bill of sale of three-fourths of the Nereus and of the Industry, to himself, or to any other person, and in the event of their being lost, to collect the money which should become due under a policy upon them and their freight; was a naked power, not coupled with an interest, which, though irrevocable by Rousmaniere, in his lifetime, expired on his death.

That this species of security was agreed upon, and given under a misunderstanding, by the parties, of its legal character, was conceded, in the argument of the cause, by the bar and bench; and the second question, for the consideration of the Court, was, whether a Court of Equity could afford relief in such a case, by directing a new security, of a different character, to be given; or by decreeing that to be done, which the parties supposed would have been effected by the instrument agreed upon? After an examination of the cases, applicable to the general question, it was stated, by the Chief Justice, who delivered the opinion of the Court, that none of them asserted the naked principle, that relief could be granted, on the ground of ignorance of law, or decided, that a plain and acknowledged mistake, in law, was beyond the reach of a Court of Equity. The conclusion, to which he came, is expressed in the following terms:—

"We find no case, which we think precisely in point; and are unwilling, where the effect of the instrument is acknowledged to have been entirely misunderstood, by both parties, to say, that a Court of Equity is incapable of affording relief."

The decree was, accordingly, reversed; but the case being one in which creditors were concerned, the Court, instead of giving a final decree on the demurrer, in favour of the plaintiff, directed the cause to be remanded, that the Circuit Court might permit the defendants to withdraw their demurrer, and to answer the bill.

After the cause was returned to that Court, the demurrer was withdrawn, and an answer was filed, in which the defendants, after admitting the loans, mentioned in the bills, by the plaintiff to their intestate, and the notes, given for the same, by the latter, and their non-payment; assert their ignorance of any agreement, between the plaintiff and their intestate, that the former should have a specific security, other than the powers of attorney, to sell vessels and to collect the proceeds, or, the amount of the policies, in case they should be lost; but express their belief, that the powers of attorney were selected by the plaintiff, in preference to the other securities, which were offered by the intestate. The answer further states, that the estate of Rousmaniere is greatly insolvent, and had been so before his death; that the plaintiff had exhibited and proved his demand, as stated in his bill, before the Commissioners of Insolvency, duly appointed, upon the estate of Rousmaniere; and that his dividend thereon declared, or to be declared, the defendants were, and would be ready, to pay, according to law.

The principal deposition, taken in the cause, is that of Benjamin Hazard, counsellor at law; who deposes, that he drew the powers of attorney, annexed to the original bill.—That on the day the first power was executed, Hunt and Rousmaniere came to his office, when the latter stated, that the former had loaned, or agreed to loan, to him, a sum of money, upon security to be given by him, on his interest in the brig Nereus, and that he was desirous the security should be as ample and available to Hunt, as it could be made. That he wished, and was ready, to give a bill of sale of the property, or a mortgage on it, or any other security, which Mr. Hunt might prefer. Both the parties declared that they had called upon the witness, to request him to draw the writings, and to obtain his opinion, as to the kind of instrument which would give the most perfect security to the lender. That the deponent then told the parties, that a bill of sale, or mortgage, would be good security, but that an irrevocable power of attorney, such as was afterwards executed, would be as effectual and good security, as either of the others; and would prevent the necessity of changing the vessel's papers, and of Hunt's taking possession of the vessel, upon her arrival from sea. That the parties then requested him to draw such an in-

strument, as, in his opinion, would most effectually and fully secure Mr. Hunt; and that the plaintiff frequently asked him, whilst he was drawing the power, and after he had finished, and read it to the parties, if he was quite certain that the power would be as safe and available to him, as a bill of sale, or mortgage, and that upon his assurances that it was, it was then executed. The witness then proceeds to express his opinion, from his knowledge of the parties, and from their declaration at the time, that Rousmaniere would readily have given an absolute bill of sale of the property, or any other security which could have been asked; and that Hunt would not have accepted the one which was afterwards executed, if he had not considered it to be as extensive and perfect a security, in all respects, as an absolute bill of sale; and he adds, more positively, that such was the understanding and agreement of both the parties.

It appears, by the testimony of this witness, that he drew the power of attorney, concerning the Industry, for securing the second loan made by the plaintiff to Rousmaniere, and that the circumstances attending that transaction, were essentially the same as those which have been stated, in respect to the first loan.

We find another deposition in the record, which deserves to be noticed, as it consists of declarations, made by the plaintiff, after the powers of attorney were executed, and may serve, in some measure, to explain the more positive testimony given by Mr. Hazard. This witness, William Merchant, deposes, that, after the decease of Rousmaniere, the plaintiff stated to him, and to a Mr. Rhodes, that in consequence of his declining to engage in an enterprise in one of the vessels of Rousmaniere, to which he had at one time consented, and of the complaints of Rousmaniere, on that account, he was induced to offer to Rousmaniere a loan of money. That an agreement was accordingly made, by which he, Hunt, was to let Rousmaniere have a certain sum on loan, and Rousmaniere was to give him a bill of sale of a certain vessel; but that afterwards, Hunt, reflecting, that if he took that security, he would have to take out papers at the custom-house, in his own name, be subject to give bonds for the vessel, and perhaps be made liable for breaches of law committed by others, he consulted with Mr. Hazard upon the subject; who told him that he could, or would, draw an irrevocable power of attorney, to sell which, would do as well, and which was accordingly done.

The cause coming on to be heard, in the Court below, and that Court being of opinion, that the plaintiff had then no lien, or specific security upon these vessels, and no equity to

have such lien or security created against the general creditors of Rousmaniere, dismissed the bill; from which decree, the cause has been brought, by appeal, to this Court.

It must be admitted, that the case, as it is now presented to the Court, is not materially variant from that which we formerly had to consider; except in relation to the rights of the general creditors, against the insolvent estate of a deceased debtor, in opposition to the equity which a particular creditor seeks, by this bill, to set up. The allegations of the bills, filed in this cause, which were, on the former occasion, admitted by the demurrer to be true, are now fully proved, by the testimony taken in the cause.

Before proceeding to state the general question, to which the facts in this case give rise, or the principles of equity, which apply to it, it will be necessary, distinctly, to ascertain, what was the real agreement concluded upon between the plaintiff and the intestate, the performance of which, on the part of the latter, was intended to be secured by the powers of attorney? Was it that Rousmaniere should, in addition to his notes for the money agreed to be loaned to him by the plaintiff, give a specific and available security on the Nereus and the Industry, or, was the particular kind of security selected by the parties, and did it constitute a part of the agreement? It is most obvious, from the plaintiff's own statement, in his amended bill, as well as from the depositions appearing in the record, that the agreement was not closed, until the interview between the parties to it, with Mr. Hazard, had taken place. The amended bill states, that the specific security which Rousmaniere offered to give, was a mortgage of the two vessels, for which irrevocable powers of attorney were substituted, by the advice of Mr. Hazard, and for reasons, which it would seem, were approved of and acted upon, by the plaintiff. From the testimony of Mr. Merchant, it would appear, that the security proposed by Rousmaniere, was a bill of sale of the vessels, which the plaintiff declined accepting, for reasons of his own, uninfluenced by any suggestions of Mr. Hazard, who merely proposed the powers of attorney as a substitute for the other forms of security which had been offered by Rousmaniere. The difference between these statements is not very material, since it is apparent from both of them, that the proposed security, by irrevocable powers of attorney, was selected by the plaintiff, and incorporated into the agreement, by the assent of both the parties. The powers of attorney do not contain, nor do they profess to contain, the agreement of the parties; but was a mere execution of that agreement, so far as it stipulated to give to the plaintiff a specific security on the two vessels, in the mode selected and approved of by the parties, to

which extent, it was a complete consummation of the agreement. Such was the opinion of this Court upon the former discussion of this cause in the year 1823, and such is its present opinion. Upon this state of the case, the general question to be decided, is the same now that it formerly was, and is that which has already been stated.

There are certain principles of equity, applicable to this question, which, as general principles, we hold to be incontrovertible. The first is, that where an instrument is drawn and executed, which professes, or is intended, to carry into execution, an agreement, whether in writing or by parol, previously entered into, but which, by mistake of the draftsman, either as to fact or law, does not *fulfil*, or which violates the manifest intention of the parties to the agreement, equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. The reason is obvious—The execution of agreements, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and if the instrument which is intended to execute the agreement, be, from any cause, insufficient for that purpose, the agreement remains as much unexecuted, as if one of the parties had refused, altogether, to comply with his engagement; and a Court of Equity will, in the exercise of its acknowledged jurisdiction, afford relief in the one case, as well as in the other, by compelling the delinquent party fully to perform his agreement, according to the terms of it, and to the manifest intention of the parties. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact, a Court of Equity will, in general, grant relief, according to the nature of the particular case in which it is sought. Whether these principles, or either of them, apply to the present case, must, of course, depend upon the real character of the agreement under consideration. If it has been correctly stated, it follows, that the instrument, by means of which the specific security was to be given, was selected by the parties to the agreement, or rather by the plaintiff; Rousmaniere having proposed to give a mortgage, or bill of sale of the vessels, which the plaintiff, after consideration, and advice of counsel, thought proper to reject, for reasons which were entirely satisfactory to himself. That the form of the instrument, so chosen by the plaintiff, and prepared by the person who drew it, conforms, in every respect, to the one agreed upon, is not even asserted in the bill, or in the argument of counsel. The avowed object of the plaintiff was, to obtain a valid security, but in such a manner, as that the legal interest in the property should remain with Rousma-

niere, so that the plaintiff might be under no necessity to take out papers at the custom-house, in his own name, and might not be subject to give bonds for the vessels, or to liabilities for breaches of law, committed by those who were intrusted with the management of them. That the general intention of the parties was, to provide a security, as effectual as a mortgage of the vessels would be, can admit of no doubt; and if such had been their agreement, the insufficiency of the instruments, to effect that object, which were afterwards prepared, would have furnished a ground for the interposition of a Court of Equity, which the *representatives* of Rousmaniere could not easily have resisted. But the plaintiff was not satisfied to leave the kind of security which he was willing to receive, undetermined; having finally made up his mind, by the advice of his counsel, not to accept of a mortgage, or bill of sale, in nature of a mortgage. He thought it safest, therefore, to designate the instrument; and, having deliberately done so, it met the view of both parties, and was as completely incorporated into their agreement, as were the notes of hand for the sum intended to be secured. In coming to this determination, it is not pretended that the plaintiff was misled by ignorance of any fact, connected with the agreement which he was about to conclude. If, then, the agreement was not founded in a mistake of any material fact, and if it was executed in strict conformity with itself; we think it would be unprecedented, for a Court of Equity to decree another security to be given, not only different from that which had been agreed upon, but one which had been deliberately considered and rejected by the party now asking for relief; or to treat the case, as if such other security had in fact been agreed upon and executed. Had Rousmaniere, after receiving the money agreed to be loaned to him, refused to give an irrevocable power of attorney, but offered to execute a mortgage of the vessels, no Court of Equity could have compelled the plaintiff to accept the security so offered. Or, if he had totally refused to execute the agreement, and the plaintiff had filed his bill, praying that the defendant might be compelled to execute a mortgage instead of an irrevocable power of attorney; could that Court have granted the relief specifically asked for? We think not. Equity may compel parties to perform their agreements, when fairly entered into, according to their terms; but it has no power to make agreements for parties, and then compel them to execute the same. The former is a legitimate branch of its jurisdiction, and in its exercise, is highly beneficial to society. The latter is without its authority, and the exercise of it would be not only an usurpation of power, but would be highly mischievous in its consequences.

(Hunt vs. Rousmaniere's Adm.)

If the Court could not have compelled the plaintiff to accept, or Rousmaniere to execute, any other instrument, than the one which had been agreed upon between them, the case is in no respect altered by the death of the latter, and the consequent inefficiency of the particular security which had been selected; the objection to the relief asked for, being in both cases the same, namely, that the Court can only enforce the performance of an agreement according to its terms, and to the intention of the parties; and cannot force upon them a different agreement. That the intention of the parties, to this agreement, was frustrated, by the happening of an event, not thought of, probably, by them, or by the counsel who was consulted upon the occasion, is manifest. The kind of security which was chosen, would have been equally effectual, for the purpose intended, with a mortgage, had Rousmaniere lived until the power had been executed; and it may therefore admit of some doubt, at least, whether the loss of the intended security is to be attributed to a want of foresight, in the parties, or to a mistake of the counsel, in respect to a matter of law. The case will, however, be considered in the latter point of view.

The question, then, is, ought the Court to grant the relief which is asked for, upon the ground of mistake arising from any ignorance of law? We hold the general rule to be, that a mistake of this character is not a ground for reforming a deed founded on such mistake; and whatever exceptions there may be to this rule, they are not only few in number, but they will be found to have something peculiar in their characters.

The strongest case which was cited and relied upon by the appellant's counsel, was that of Landsdown *vs.* Landsdown, reported in *Mosely*. Admitting, for the present, the authority of this case, it is most apparent, from the face of it, that the decision of the Court might well be supported upon a principle not involved in the question we are examining. The subject which the Court had to decide, arose out of a dispute between an heir at law, and a younger member of the family, who was entitled to an estate descended; and this question, the parties agreed to submit to arbitration. The award being against the heir at law, he executed a deed in compliance with it, but was relieved against it on the principle that he was ignorant of his title.

If the decision of the Court proceeded upon the ground that the plaintiff was ignorant of the fact that he was the eldest son, it was clearly a case proper for relief, upon a principle which has already been considered.

If the mistake was of his legal rights, as heir at law, it is not going too far to presume, that the opinion of the Court

may have been founded upon the belief, that the heir at law was imposed upon by some unfair representations of his better informed opponent; or that his ignorance of a legal principle, so universally understood by all, where the right of primogeniture forms a part of the law of descents, demonstrated a degree of mental imbecility, which might well entitle him to relief. He acted, besides, under the pressure of an award, which was manifestly repugnant to law, and for aught that is stated in this case, this may have appeared upon the face of it.

But if this case must be considered as an exception from the general rule which has been mentioned; the circumstances attending it, do not entitle it, were it otherwise unobjectionable, to be respected as an authority, but in cases which it closely resembles. There is a class of cases which it has been supposed forms an exception from this general rule, but which will be found, upon examination, to come within the one which was first stated. The cases alluded to, are those in which equity has afforded relief against the representatives of a deceased obligor, in a joint bond, given for money, lent to both the obligors, although such representatives were discharged at law. The principle upon which these cases manifestly proceed, is, that the money being lent to both, the law raises a promise in both to pay, and equity considers the security of the bond as being intended, by the parties, to be co-extensive with this implied contract by both to pay the debt. To effect this intention, the bond should have been made joint and several; and the mistake in the form, by which it is made joint, is not in the agreement of the parties, but in the execution of it by the draftsman. The cases in which the general rule has been adhered to, are, many of them, of a character which strongly test the principle upon which the rule itself is founded. Two or three only need be referred to. If the obligee, in a joint bond, by two or more, agree with one of the obligors, to relieve him from his obligation, and does accordingly execute a release, by which all the obligors are discharged at law, equity will not afford relief against this legal consequence, although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. So, in the case of Worral *vs.* Jacob, 3 *Merv.* 271, where a person having a power of appointment and revocation, and, under a mistaken supposition, that a deed might be altered or revoked, although no power of revocation had been reserved, executed the power of appointment without reserving a power of revocation; the Court refused to relieve against the mistake.

The case of Lord Irnham *vs.* Child, 1 *Bro. C. C.* 92, is a very strong one in support of the general rule, and closely

resembles the present, in most of the material circumstances attending it. The object of the suit was to set up a clause containing a power of redemption, in a deed granting an annuity, which, it was said, had been agreed upon by the parties, but which, after deliberation, was excluded by consent, from a mistaken opinion, that it would render the contracts usurious. The Court, notwithstanding the omission manifestly proceeded upon a misapprehension of the parties as to the law, refused to relieve by establishing the rejected clause. It is not the intention of the Court, in the case now under consideration, to lay it down, that there may not be cases in which a Court of Equity will relieve against a plain mistake, arising from ignorance of law. But we mean to say, that where the parties, upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security so selected, a Court of Equity will not, on the ground of such misapprehension, and the insufficiency of such security, in consequence of a subsequent event, not foreseen, perhaps, or thought of, direct a new security, of a different character, to be given, or decree that to be done which the parties supposed would have been effected, by the instrument which was finally agreed upon.

If the Court would not interfere in such a case, generally, much less would it do so in favour of one creditor, against the general creditors of an insolvent estate, whose equity is, at least, equal to that of the party seeking to obtain a preference, and who, in point of law, stand upon the same ground with himself. This is not a bill asking for a specific performance of an agreement to execute a valid deed for securing a debt; in which case, the party asking relief, would be entitled to a specific lien; and the Court would consider the debtor as a trustee, for the creditor of the property on which the security was agreed to be given. The agreement has been fully executed, and the only complaint is, that the agreement itself was founded upon a misapprehension of the law, and the prayer is to be relieved against the consequences of such mistake. If all other difficulties were out of the way, the equity of the general creditors to be paid their debts equally with the plaintiff, would, we think, be sufficient to induce the Court to leave the parties where the law has placed them.

The decree is to be affirmed, with costs.

DANIEL CARROLL, OF DUDINGTON, PLAINTIFF IN ERROR, *vs.* JOSHUA PEAKE, DEFENDANT IN ERROR.

When a party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement in his own handwriting, but not signed by him, and from the nature of the instrument, it was to be fairly presumed, the original was in his custody; notice to produce the original paper, in order to give the copy in evidence, is not necessary. Such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered not as a copy, but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence. {22}

Where letters, a part of the evidence in the Court below, have become lost or mislaid, every thing is to be presumed to have been contained in them, to support the opinion of the Court, in relation to their contents; and the party who denies that the letters authorized the decision of the Court upon them, must show, by evidence, their contents. {22}

Surplusage in pleading, does not, in any case, vitiate, after verdict. {23}

In a declaration upon an agreement, by way of lease, by which the lessor stipulated to let a farm, from the 1st of January 1820, to remove the former tenant, and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that, although specially requested on the said 1st of January, the defendant refused, and neglected to turn out the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff; this assignment is sufficient. {23}

It is sufficient, that the averment should state the plaintiff's readiness and offer, and his request, on the first day of January generally, and not at the last convenient hour of that day; and if an averment of a personal demand is made, it need not have been on the land. {24}

The strict doctrines relative to averments in pleading, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons. {24}

Declarations containing general averments of readiness and request, have been held sufficient, especially after verdict, unless in very peculiar cases. {24}

IN the Circuit Court of the United States, for the district of Columbia, the defendant in error, instituted a suit against the plaintiff in error, to recover damages arising out of alleged breaches of an agreement, in the nature of a lease, dated 18th of December 1819. The declaration stated the agreement; and the damages claimed, were as an indemnity for expenses incurred by the plaintiff, under the agreement, for losses of profits, and for not turning out the tenant who was in possession of the property, when the agreement was made. To support the issue on his part, the plaintiff offered to read in evidence to the jury, the following copy of a paper, (the original of

which, was signed by Joshua Peake,) and which was admitted to be wholly in the handwriting of the plaintiff in error.

"I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county, for which I oblige myself to pay, on the 1st day of January 1821, for one year, from the 1st of January 1820, six hundred dollars, ($600,) and to pay all taxes on the same, independent of the above rent; and also, I oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises.

Witness my hand, this 18th day of December, 1819.

It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same on the tax bill, receipted, out of the rent.

(Signed,) JOSHUA PEAKE.

Witness,
WILLIAM DUDLEY DIGGES."

To the admission of this paper, by the Court, the counsel for the plaintiff objected, but the Court allowed it to be read by the jury, upon which, they rendered a bill of exceptions; and by writ of error, the cause was brought before this Court; and was argued by Mr. Key and Mr. Cox, for the plaintiff in error, and by Mr. Jones, for the defendant.

For the plaintiff in error, it was said, that the declaration sets forth the agreement of lease, that the possession of the property was to be given, the expenses to which the lessee was exposed; and that the plaintiff in error did not perform any of the acts necessary, to turn out the tenant, who was in possession of the land when the lease was to commence.

The declaration should have averred a readiness on the part of the lessee to comply with his contract, as to time and place. Savary *vs.* Goe, 3 *Washington's Decisions*, 140.

The proper day to deliver possession, was the day on which the lease was to commence; and the declaration should have averred, that the lessee was at the place in person, or by attorney, at that time, to receive it. Instead of this, the breach is laid, if any where, in the county of Washington, and the property described in the lease, is in the county of St. Mary's; nor is it averred, that, by the lease, the plaintiff in error was bound to turn out the person in possession, although damages are claimed for not doing this.

2. The party who gives a lease, is not bound to turn the prior tenant out of possession. The lessor has, by the lease, parted with the control of the property; and the lessee should proceed, under the law of Maryland, to obtain the possession; but, if it was the duty of the lessor to obtain the possession

for the lessee, the lessee should have required this of him; and his non-compliance with the demand should have been averred.

3. The paper admitted in evidence, was a copy; and the copy of a deed is not evidence, unless the original is destroyed, or lost. It is not said the paper was a *true* copy; and the original, if in possession of Peake, might have been produced; or, if in the possession of the plaintiff in error, might have been called for.

Mr. Jones, for the defendant in error, contended, that, by the operation of the statute of *Jeo fales*, the verdict of the jury had cured all the defects of the declaration, if any existed; and that the declaration contained every necessary statement and averment for the plaintiff's case. When the condition in an agreement is precedent, special performance must be set out and averred; and, when a tender is pleaded, it is necessary to set forth minutely, every thing of time and place. In this case, it was not required to declare specially.

2. The Act of Assembly of Maryland, gives to the landlord, only, and not to the lessee, a right to proceed, for possession, against persons "holding over."

3. The "copy" of the paper, which copy was wholly in the handwriting of the plaintiff in error, and who must have kept the original paper, was primary, and not secondary evidence, *quoad*, the matters in controversy. It was evidence against the lessor, and was in the nature of a counterpart of the agreement; and necessary to charge the lessor, who had not signed the lease, and who, it must be presumed, retained the possession of it.

Mr. Justice TRIMBLE delivered the opinion of the Court.—

This is a writ of error, to a judgment of the Circuit Court, for the district of Columbia, held in the county of Washington.

Joshua Peake brought this action on the case, in that Court, upon a special agreement against Daniel Carroll, who pleaded, the general issue; and, upon the trial, a verdict and judgment were rendered for the plaintiff therein. A bill of exceptions was taken by the defendant, in the Court below; which states, that the plaintiff, to support the issue on his part, offered to read in evidence to the jury, the following *copy* of a paper, (the execution of the original of which, was admitted,) signed by Joshua Peake, which copy is admitted to be, wholly, in the handwriting of the defendant, to wit:—"I agree to rent of Daniel Carroll, of Dudington, the land rented heretofore to Wilfred Neale, the same being in St. Mary's county; for which I oblige myself to pay, on the 1st day of January 1821, for one year, from the 1st day of January 1820, six

hundred dollars, ($600,) and to pay all taxes on the same, independent of the above rent; and also, oblige myself to keep the premises in good repair, and not to commit, nor suffer to be committed, any waste on the said premises.

Witness my hand, this 11th day of December 1819.

It is agreed, that the taxes shall be paid by Joshua Peake, and the said Carroll will allow the same, on the tax bill, receipted, out of the rent.

JOSHUA PEAKE.

Witness,
WILLIAM DUDLEY DIGGES."

Which paper was so offered in evidence, in connexion with three letters from defendant to the plaintiff, as a component part of the sum of evidence relied on, to prove the contract as laid in the declaration; which letters are in these words and figures, following, &c.—[The letters were mislaid.]

To the reading of which paper, the defendant, by his counsel, objected, as not being competent and legal evidence, to charge the defendant in this case; but the Court permitted the said paper to be read in evidence to the jury, &c., to which opinion of the Court, the defendant, by his counsel, excepted, &c. The plaintiff, then, further to support the issue on his part, offered in evidence to the jury, the said letters, from defendant to plaintiff, and admitted to be in the handwriting of the defendant; as component parts, in connexion with the said paper before admitted, of the evidence of the agreement on which this action is founded; to the admission of said letters, as part of said *agreement*, the defendant, by his counsel, objected; but the Court overruled said objection, and permitted said letters to be read to the jury, as part of said agreement; to which opinion of the Court, the defendant, by his counsel, excepted.

It is insisted by the counsel for the plaintiff in error, that these opinions are erroneous; and that the judgment of the Circuit Court should, for that cause, be reversed.

The bill of exceptions does not put the objection to the paper offered in evidence, distinctly, upon the ground, that, being a copy, it could not be used, without timely notice to produce the original. Although some doubt exists, whether the objection ought not to have been placed on that ground, in the Court below, in order to make it available here; yet, as the whole argument in this Court, has proceeded upon the assumption, that the question is sufficiently raised upon the bill of exceptions, we will so consider it. The principle relied upon is, that a copy cannot be given in evidence, if the original be in the possession of the adverse party; unless timely

previous notice has been given him, to produce it at the trial. This is certainly true, as a general rule. But in examining the numerous adjudged cases to be found in the books, in which this general rule has been asserted and applied, we have been able to find no case like this. They are all cases where the copy offered, had not been made by the party, against whom it was attempted to be used. This is a case in which the execution of the original is distinctly admitted; and the paper called a copy, is admitted to be wholly in the defendant's handwriting. From the nature of the transaction, he was entitled to, and must be presumed to have, the custody of the original. The copy, made out by himself, must be presumed to have come to the plaintiff's possession, by the defendant's own act; and, by making and delivering it to the plaintiff, the defendant consents that it shall be considered genuine and true. We think, that, under such circumstances, this case forms a just exception to the general rule; and that it is not competent, for the defendant below, to allege against his own acts and admissions, that this paper does not, nor may not, contain all the verity and certainty of the original. So far we have considered this paper as if it ought to be regarded in the light of a copy. But, we think, that is not its true character, as it was presented to the Court and jury. We think, that, under the circumstances, and to the purposes for which it was offered, it may fairly be regarded as an original.

As relates to Peake's contract to pay rent, &c., it was a copy; but was it a copy, as respects Carroll's agreement to let the farm? If so, it was a copy, without an original—for the original paper was not signed by Carroll, and contained no contract, on his part. The paper was offered in evidence, in connexion with the three letters from the defendant to the plaintiff, as a *component* part of the evidence, to prove the defendant's agreement to let the farm to the plaintiff, and the terms of that agreement. The clerk certifies, that the letters referred to, are not on file in the cause, and they are not transcribed into the record. In their absence, if there be a supposable case, in which they, and the paper called a copy, were legitimate evidence, regarding that paper, as an original, and not as a mere copy, it must be so regarded. We are bound to presume every thing in favour of the correctness of the decision of the Court below, until the contrary appears.

If the letters, which are admitted to be in the defendant's handwriting, were relevant to the matter in controversy, and, in their absence, that must be presumed; no doubt can exist, of their being competent and legitimate evidence, to prove the contract sued on, so far as they spoke on that subject. It has been already remarked, that the paper called a copy, was ad-

mitted to be in the defendant's handwriting, and that it must have come to the plaintiff's hands, by the defendant's act. Let it be supposed, then, that having copied, in his own hand, Peake's agreement to pay rent, &c. he had enclosed that paper, in one of those letters, and referring to it. The letter here stated, that he, (Carroll,) agreed to let and lease the farm to Peake, upon terms expressed in the enclosed paper. It is plain, that, in the case supposed, the enclosed paper, although it might be a mere copy, as respected Peake's part of the contract, yet, as respected the contract on Carroll's part, would be truly an original document, by adoption and incorporation with the letter, as much as the letter itself. It would be a part of the letter. We do not say, the paper was thus enclosed, and referred to, in the letters, or either of them; but it might have been, for ought that appears, and that is enough.

Upon the principle assumed as correct, that the opinion of the Court below must be regarded as sound, until its incorrectness is made to appear, the plaintiff in error cannot prevail; unless he can show, in the absence of the letters, that no case could have existed, they being present, in which the paper objected to, could be considered in the light of an original document. The case first shows, that such a case might have existed, and have been proved, upon the trial. It is, by no means, a strange supposition, to presume that such was the aspect of the case; for it is perfectly consistent with a known and familiar manner of transacting business, where the parties reside at a distance, or where, for other causes, the mode of contracting, by correspondence, is resorted to. It is objected, that the declaration shows no cause of action; and it is insisted the judgment shall be reversed, for that cause. The declaration is very loosely drawn, and a great deal of matter is crowded into it, which is impertinent, or, at most, only in aggravation of damages. But surplusage, in pleadings, does not vitiate, in any case, after verdict; and wholly disregarding the impertinent and irrelevant matter, the declaration contains enough to support the action. The declaration, in substance, alleges, that the defendant below agreed to rent, and to farm-let to the plaintiff, the farm, for one year from the 1st of January 1820, and agreed to remove the former tenant, and that the plaintiff should have the possession and occupancy of the farm, from the 1st of January aforesaid, free from the let, hindrance, or disturbance of any one. The declaration then proceeds to aver, that on the said 1st of January 1820, at the county aforesaid, the plaintiff was ready and willing, and offered to the said Daniel (the defendant) to take possession of the said land and farm, and to rent and occupy the same, &c., and afterwards assign breaches. *(inter alia)* in this, that al-

though specially requested so to do, on the said 1st day of January 1820, the defendant refused and neglected to turn out the tenant, who then was, and had been, in the possession and occupancy of the said land and farm, and to deliver the possession thereof to the said Joshua.

The specific objections, urged in argument, are, that the plaintiff should have averred his readiness, and offered his request; not on the 1st day of January, generally, but at the last convenient hour of that day; and that instead of charging a personal demand, it ought to have been averred to have been made on the land. It must occur to every one, that an offer and request upon the land, in the absence of the defendant, would be a very idle and useless ceremony, and that an offer and request to him, personally, was much better calculated to enable him to perform his duty, and fulfil his agreement.

We cannot admit that it was necessary the offer and request should be made, at the last convenient hour of the day. The strict doctrines contended for, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons; but there is no analogy between them and this case.

In declarations, general averments, of readiness and request on the day, have always been held sufficient, especially after verdict.

We are of opinion, there is no error in the judgment and proceedings of the Circuit Court, and the same is affirmed, with damages and costs.

THE PRESIDENT AND DIRECTORS OF THE BANK OF WASHINGTON, PLAINTIFFS IN ERROR, *vs.* PHILIP TRIPLETT AND CHRISTOPHER NEALE, TRADING UNDER THE FIRM OF TRIPLETT & NEALE, DEFENDANTS IN ERROR.

The deposit of a bill in one bank, to be transmitted to another, for collection, is a common usage, of great public convenience, the effect of which, is well understood; and the duty of a bank, receiving such a bill for collection, is precisely the same, whoever may be the owner thereof; and if it was unwilling to undertake the collection, without precise information on the subject, the duty ought to have been declined. {30}

If, in any case, in which testimony was offered by a plaintiff, the Court ought to instruct the jury that he had no right to recover, such instruction certainly ought not to be granted, if any possible construction of the testimony would support the action. {31}

By failing to demand payment of a bill held for collection, the bank would make the bill its own, and would become liable to its real owner for the amount. {31}

The allowance of days of grace for the payment of a bill of exchange, or note, is now universally understood to enter into every bill or note of a mercantile character; and so, to form a part of the contract, that the bill does not become due until the last day of grace. {31}

It is the usage of the Bank of Washington, and of other banks in the district of Columbia, to demand payment of a bill on the day after the last day of grace; and this usage has been sanctioned by the decisions of this Court. This usage is equally binding on parties who were not acquainted with its existence, but who have resorted to the bank governed by such usage, to make the bill negotiable. {32}

The usage of the place on which a bill is drawn, or where payment is demanded, uniformly regulates the number of days of grace which must be allowed. {34}

The failure of a bank holding a bill payable after date for collection, to give notice to the drawer, that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharges the drawer from his liability. {35}

A bill of exchange, payable after date, need not be presented for acceptance before the day of payment; but, if presented, and acceptance be refused, it is dishonoured, and notice must be given. The absence from his home, of the drawee of a bill payable after date, when the holder of a bill, or his agent, calls with it for acceptance, is not a refusal to accept; but such absence, when the bill is due, is a refusal to pay, and authorizes a protest. {35}

In a suit instituted by the holder of a bill, against the bank, for negligence, in relation to demand, or notice of non-payment of the bill, the Court, although required, are not bound to declare the law as between the holder and the drawer. The bank was the agent of the holder, and not of the drawer, and might, consequently, so act, as to discharge the drawer, without becoming liable to its principal. {36}

TRIPLETT & NEALE, the appellees, instituted a suit in the Circuit Court for the District of Columbia, against the

(Bank of Washington *vs.* Triplett & Neale.)

President and Directors of the Bank of Washington, the appellants; for mal-agency in relation to an inland bill of exchange, dated Alexandria, 19th June, 1817, drawn by W. H. Briscoe, for 625 dollars 34 cents, at four months after date, in favour of Triplett & Neale, upon Peter A. Carnes, Esqr. "Washington City." About the 19th of July, 1817, the plaintiffs, being the holders and the proprietors of the bill, placed it in the hands of the Cashier of the Mechanics Bank of Alexandria, for the purpose of its being transmitted to a bank in Washington for collection, they endorsing it in blank for that purpose. The bill, after being endorsed by the Cashier of the Bank, to the order of "S. Elliott, Jr. Esqr." was sent by mail to the Bank of Washington, of which Mr. Elliott was then Cashier; together with other bills and notes, without any statement of interest or ownership in the same, by Triplett & Neale. On the 19th October, 1817, the Cashier of the Mechanics Bank of Alexandria, informed the Cashier of the Bank of Washington, that "the holder of the draft desired, that if the draft should not be paid, a notary should send a notice to P. A. Carnes, Baltimore, and to Mr. W. H. Briscoe, at Leesburgh, provided the bill should not be paid in Washington." On the 24th October, 1817, the draft was returned to the Mechanics Bank of Alexandria, it having been protested, for non-payment, on the 23d of October; the drawer and endorser having been regularly notified of the non-payment by the notary. When the bill was received in Washington, on the 21st July, 1817, the drawee was not to be found; one of the officers of the Bank having sought him, in order to present the bill to him, and who was informed that he was in Baltimore. This inquiry was repeated three or four days afterwards, with the same results, of which the Cashier was informed. No notice of the non-acceptance of the bill was given by the Bank of Washington to the drawer or to the endorser. Evidence was given, by the defendants below, of the custom in the banks of the city of Washington, and particularly of the defendants, as to the mode of treating bills, when the drawee could not be found, and as to the practice of protesting or not protesting such bills, for non-acceptance. Evidence was also offered, as to the incompetency of Carnes and Briscoe to discharge the bill, at the time of its non-payment; and that since the said period, Briscoe had inherited an estate.

The appellants, on the trial of the cause, requested the Court to instruct the jury:—

1st. That on the evidence, if believed by the jury, the plaintiffs could not recover.

2d. That the plaintiffs are not entitled to recover, for any loss of recourse against Briscoe, the drawer of the bill.

(Bank of Washington vs. Triplett & Neale.)

3d That the failure of the defendants; after having called at the residence of the drawee of said bill, to obtain his acceptance thereof, as stated in the evidence of Reilly, and not finding him or any other person there, to accept the said bill; to notify the drawer of that circumstance, was not such a negligence as discharged the said drawer from his liability on said bill; and entitles the plaintiffs to recover.

4th. That if they believe, from the evidence, that the defendants conformed to their former usage in regard to such bills as the one in question, in calling on the drawee for acceptance, the said drawee being from home, and not noting the same as dishonoured, and giving notice thereof to the parties on the said bill; then their failure to treat the said bill as dishonoured, and to give notice accordingly, of its non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs. All of which instructions were refused by the Court, and a verdict was given against the Bank of Washington for the whole amount of the claim. The defendants below took a bill of exceptions, to the opinion of the Court, upon the propositions stated; and thereupon prosecuted this writ of error.

Mr. Key, for the plaintiffs in error. There was no privity between the plaintiffs below, and the Bank of Washington; the bill was sent to the Bank of Washington, by the Mechanics Bank of Alexandria, and it was not known that Triplett & Neale were in any manner interested in it. Before a contract can be presumed to have been made with them to collect the bill, their interest should have been communicated; 2 *Caines*, 341. The plaintiff in error should have had the opportunity to accept or reject the inquiry, as the collection of the draft was only an act of courtesy. The law is with the plaintiffs in error on this point. 6 *Taunton*, 147—1 *Vesey jun.* 291—2 *Johnson*, 204. In the last case, a notary public gave notice of the non-payment of a note to one endorser, and failed to notify a prior endorser; the last endorser having paid the note, it was decided that a suit could not lie against the notary public for laches, he being liable only to the holder of the note.

2d. Negligence, and loss in consequence of it, must be shown.

The bill was payable four months *after date*, and it is not necessary to present such a bill for acceptance. *Chitty on Bills*, 205—Philadelphia edition, 1821: as to responsibility, where prejudice has not arisen; Beawes Lex. Merc. 544, 491, was cited, as to the mode of presentation of such a bill—*Starkey's Evid.* 4, part 456.

3d. If the Bank of Washington was bound to present the bill, the negligence of the plaintiffs in error to do this, should

have been stated specially in the declaration; and the loss thereby specially averred; 2 *Espin.* 16—2 *Wilson*, 325.

4th. The conduct of the Bank was according to their established customs, and to the practises in other banks, and if they acted *bona fide*, they should not be charged with the amount of the bill. The usage is, to protest the bill on the fourth day after the nominal day of payment, and the day after the three days of grace. The rule and practice as to non-acceptanced bills, is the same in this particular, with those which have been accepted.

Mr. Jones, for defendants in error. The claim of the defendants in error, is founded upon the gross negligence of the Bank—and this is fully made out by the testimony.

1. As to the absence of privity between the parties of this suit. The custom to collect notes for individuals, which prevailed among all banks, and the fact that no other interest existed in the bill, but that of Triplett & Neale, are sufficient to establish privity between the parties to the action. A suit upon a contract made by an agent, may be brought in the name of the principal; although his interest in the contract does not appear on its face.

2. Negligence is charged in the declaration throughout; and by the usages of the Bank, particularly of the present Bank of the United States, if the drawee be absent when the bill is received, and does not call at the bank and accept, after notice left at his residence, the bill is protested, and notice given.—In this case, the bill should have been protested on the day it became due, without waiting the days of grace, which are only allowed, when the bill has been accepted. Mr. Jones cited the case of M'Gruder *vs.* the Bank of Washington. 9 *Wheat.* 598.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This is a writ of error, to a judgment of the United States' Circuit Court, of the district of Columbia, for the county of Alexandria.

On the 19th of June 1817, Wiliam H. Briscoe, of Alexandria, drew a bill on Peter A. Carnes, of Washington, payable four months after date, to the order of Triplett & Neale. The payees of the bill, endorsed it in blank, and delivered it to the Cashier of the Mechanics Bank of Alexandria, for the purpose of being transmitted, through the said bank, to a bank in Washington, for collection.

The Cashier of the Mechanics Bank of Alexandria, endorsed the bill, to the order of the Cashier of the Bank of Washington, and transmitted it to him, for collection, in a

letter of the 19th of July 1817. Neither of the banks had any interest in the bill.

The bill was protested, for non-payment; and this suit was brought by Triplett & Neale, against the Bank of Washington, to recover its amount. The declaration charges, that the bank did not use reasonable diligence to collect the money mentioned in the said bill, nor take the necessary measures to charge the drawer; but neglected to present the bill either for acceptance, or payment; and to have the same protested; whereby the plaintiffs have lost their recourse against the drawer.

It was proved, on the part of the bank, that either on the day the bill was received, or the succeeding day, one of its officers called with the bill, at the house of the said Peter A. Carnes, for the purpose of presenting it for acceptance, and was told, that he was in Baltimore. He called again, three or four days afterwards, for the same purpose; and was again told, that he was in Baltimore. These answers were reported to the Cashier.

On the 9th of October 1817, the Cashier of the Mechanics Bank of Alexandria, addressed the following letter to the Cashier of the Bank of Washington:—

"DEAR SIR,

"The holder of the draft on Peter A. Carnes, for 625 dollars 84 cents, desires me to inform you, that if the draft is not paid, to make the notary send a notice to P. A. Carnes, Baltimore, and likewise to W. H. Briscoe, Leesburg, provided it is not paid at his residence, in Washington." On the 13th of the same month, the Cashier of the Bank of Washington, in answer to this letter, stated that the bill had not been accepted, because the drawee could not be found; and that the directions given, in the letter of the 9th, should be observed. On the 24th of October, the fourth day after that expressed on the face of the bill, as the day of payment, it was protested, for non-payment, and returned, under protest, to the Mechanics Bank of Alexandria. Notice was given to the drawer, who has refused to pay the same.

On the trial, the counsel for the defendant, moved the Court, to instruct the jury:—

1st. That upon this evidence, if believed, the plaintiffs are not entitled to recover.

2d. That the plaintiffs are not entitled to recover, for any loss of recourse against Briscoe, the drawer of the said bill.

3d. That the failure of the defendants, (after having called at the residence of the drawee of the said bill, to obtain his acceptance, and not finding him, or any person there to accept it,) to notify the drawer of that circumstance, was not

such negligence, as discharged the said drawer, from his liability, on the said bill, and entitles the plaintiffs to recover.

4th. That if they believed, from the evidence, that the defendants conformed to their former usage, in regard to such bills, as the one in question, in calling on the drawee for acceptance, (the said drawee being from home,) and not noting the same as dishonoured, and giving notice thereof to the parties, on the said bill; then their failure to treat the said bill as dishonoured, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof, from his liability to the plaintiffs.

The Court refused to give either of these instructions; to which refusal, the counsel for the defendants excepted; and a verdict and judgment were rendered for the plaintiffs.

The plaintiffs in error, insist, that the Circuit Court ought to have given the instructions first asked, because, 1st, no privity existed, between the real holder of the bill, and the Bank of Washington. That bank was not the agent of Triplett & Neale, but was the agent of the Mechanics Bank of Alexandria. Some cases have been cited, to show, that if an agent employed to transact a particular business, engages another person to do it, that other person is not responsible to the principal. On this point, it is sufficient to say, that these cases, however correctly they may have been decided, are inapplicable to the case at bar. The bill was not delivered to the Mechanics Bank of Alexandria, for collection, but for transmission to some bank in Washington, to be collected. That bank would, of course, become the agent of the holder. By transmitting the bill, as directed, the Mechanics Bank performed its duty, and the whole responsibility of collection devolved on the bank which received the bill for that purpose; the Mechanics Bank was the mere channel through which Triplett & Neale transmitted the bill to the Bank of Washington.

The deposit of a bill in one bank, to be transmitted for collection, to another, is a common usage of great public convenience, the effect of which is well understood. This transaction was, unquestionably, of that character; and there is no reason for suspecting that the Bank of Washington did not so understand it. The duty of that bank, was precisely the same, whoever might be the owner of the bill; and, if it was unwilling to undertake the collection, without precise information on the subject, that duty ought to have been declined.— The custom to endorse a bill put in bank, for collection, is universal; and the Bank of Washington, had no more reason for supposing that Triplett & Neale had ceased to be the real holders, from their endorsement, than for supposing that the

(Bank of Washington vs. Triplett & Neale.)

Cashier of the bank of Washington, had become the real holder, by the endorsement to them. It is the customary proceeding, for collection, in such cases; and is for the advantage of the party interested. At any rate, the letter of the 9th of October, disclosed the real party entitled to the money; and the answer to that letter, assumes the agency, if it had not been previously assumed. The Court is decidedly of opinion, that the Bank of Washington, by receiving the bill, for collection, and, certainly, by its letter of the 13th of October, became the agent of Triplett & Neale, and assumed the responsibility attached to that character.

The first prayer of the defendants, in the Circuit Court, being to instruct the jury, that, upon the whole evidence, the plaintiff ought not to recover; if it might properly have been granted, in any case, in which any testimony was offered; certainly ought not to have been granted, if any possible construction of that testimony would support the action.

The liability of the bank, for the bill placed in its hands for collection, undoubtedly depends on the question, whether reasonable and due diligence has been used, in the performance of its duty. To maintain the charge of negligence, the counsel for Triplett & Neale, have alleged the failure to give notice of the non-acceptance of the bill, and the failure to demand payment in proper time. The counsel for the bank, have brought the first question more distinctly into view, by a more definite instruction respecting it, which was afterwards asked; and its consideration will be deferred, until that prayer shall be discussed; but the first must be disposed of, under the general prayer.

Unquestionably, by failing to demand payment in time, the bank would make the bill its own, and would become liable to Triplett & Neale for its amount. The inquiry, therefore, is into the fact.

The demand was made, on the fourth day after that mentioned on the face of the bill, as the day of payment.

The defendants in error, insist, that, if the bill was never presented for acceptance, payment ought to have been demanded, on the day mentioned on its face. If this be not so, then it ought to have been demanded, on the third day afterwards, which is the last day of grace.

The allowance of days of grace, is a usage, which pervades the whole commercial world. It is now universally understood to enter into every bill, or note, of a mercantile character, and to form so completely a part of the contract, that the bill does not become due, in fact, or in law, on the day mentioned on its face, but on the last day of grace. A demand of payment, previous to that day, will not authorize a protest, or charge the drawer of the bill.

This is universally admitted, if the bill has been accepted.

If it has been noted, for non-acceptance, but has been held up, it would not be protested, for non-payment, until the last day of grace. Why, then, should a bill never presented, be demandable, at an earlier day, than if it had been accepted, or if acceptance had been refused? Whatever might have been the original motive for the indulgence, it is now taken into consideration, both by the drawer and payee of the bill. The amount is, consequently, estimated, on the calculation, that it becomes really due, on the last day of grace. Neither party can foresee, when the bill is drawn, whether it will be paid, or not; nor, if it be payable, after date, whether it will be presented, or not. Their calculation, therefore, as to the day when it becomes really due, and is to be paid, is independent of these considerations. No sufficient reason is perceived, for the distinction.

It is, however, a law dependent on usage. The books which treat on the subject, concur in saying, that payment must be demanded when the bill falls due; and that it falls due, on the last day of grace. The distinction between a bill which has, and which has not been presented, has never been taken; and it is apparent, that a bill is never drawn, with a view to this distinction. The fact, that the question has never been made, is a strong argument against it. The point has never, so far as we can find, been brought directly before a Court; and we have seen only one case, in which it has been even incidentally mentioned.

In Anderton *vs.* Beck & Pearson, 16 *East* 248, a bill was drawn, payable two months after date, and was not presented for acceptance. It was protested for non-payment, and a suit was brought by the holder against the drawer. He resisted the demand, and the opinion of the Court proceeds on the admission that the bill fell due on the last day of grace. This case consists, we believe, with the opinions and practice of commercial towns.

But if a bill, payable after date, and not presented for acceptance, falls due on the same day as if it had been accepted, the defendants in error insist, that payment ought to have been demanded on the last day of grace.

It was proved at the trial, that the settled usage of the Bank of Washington, at that time, and of all the other banks in Washington and Georgetown, was, to demand payment on the day succeeding the last day of grace; and this usage, so far as respects notes negotiable in a particular bank, has been sanctioned by the decisions of this Court. Renner *vs.* the Bank of Columbia, 9 *Wheat.* 582, was a suit brought in a Circuit Court of the District of Columbia, against the endorser of a

promissory note, which had been negotiated in the Bank of Columbia. Payment was demanded, and the note protested on the fourth day after that mentioned in the note as the day on which it became payable. This was proved to have been in conformity with the custom of the Bank; and the defendant moved the Court to instruct the jury that the demand was not in time, and that the endorser was not liable for the note.— This instruction was refused, and the defendant brought the judgment into this Court by writ of error. The judgment, on great deliberation, was affirmed.

In this case, the custom of the Bank was known to the parties to the note. But the question arose afterwards, in a case in which the custom was not known to the parties. Mills *vs.* The Bank of the United States, 11 *Wheat.* 480, was a suit brought by the Bank against the plaintiff in error, and others, on a note endorsed by him, and negotiated in the office of discount and deposit of the Bank of the United States, which was protested, for non-payment, on the day of the last day of grace.

It was proved at the trial, that this was according to the usage of that Bank. The counsel for the defendant moved the Court to instruct the jury that this usage could not bind the endorser, unless he had personal knowledge of it, at the time he endorsed the note. The Court refused to give the instruction, and the jury found a verdict for the Bank, on which judgment was rendered. That judgment was brought before this Court, and affirmed. The Court said, that "when a note is made payable or negotiable at a Bank, whose invariable usage it is to demand payment, and give notice on the fourth day of grace, the parties are bound by that usage, whether they have a personal knowledge of it, or not."

In the case of such a note, the parties are presumed, by implication, to agree to be governed by the usage of the Bank, at which they have chosen to make the security itself negotiable.

These cases decide that under consideration, unless there be a distinction between a bill and a note made negotiable in a particular bank. In the case of a note negotiable in a particular bank, the parties may very fairly be presumed to be acquainted with the usage of that bank. As the decisions which have been cited, depend upon that presumption, it will become necessary to inquire, how far the same presumption may be justified in the case of a bill drawn on a person residing in a place where this usage is established.

If a promissory note were made in the city of Washington, payable to a person residing in the same place, though not purporting to be payable and negotiable in bank, it would very probably be placed in a bank for collection. It is a common

practice, and the parties would contemplate such an event as probable, when the note was executed.

The same reason seems to exist for applying the usage of the bank, to such a note, as to one expressly made payable and negotiable in bank. Such notes are frequently discounted, and certainly the person who discounts them, or places them in bank for collection, stands in precisely the same relation to the bank, as respects its usage, as if the notes purported on their face to be negotiable in bank. The maker of a negotiable paper, in such a case, may fairly be presumed to be acquainted with the customary law which governs that paper, at his place of residence.

In the case at bar, however, the bill was drawn at Alexandria, on a person residing at Washington. Does this circumstance vary the law of the case?

The usage by which questions of this sort are governed, is different in different places. It varies from three to thirty days—and the usage of the place on which the bill is drawn, or where payment is to be demanded, uniformly regulates the number of days of grace which must be allowed. This bill being drawn on a person residing in Washington, and being protested for non-payment in the same place, is, according to the law merchant, to be governed by the usage of Washington. Could this be questioned, still the holder of the bill, who placed it, by his agent, in the Bank of Washington for collection, who has made that bank his agent, without special instructions, submits his bill to their established usage. The cases, then, which have been cited, are not different in principle from this—and payment having been demanded, according to the invariable usage of the Bank, was demanded in time. If then the objections to the conduct of the Bank were confined to the demand of payment, and protest for non-payment, the first instruction asked by the defendants in the Circuit Court, ought to have been given. But they are not confined to the demand of payment, and to the protest for non-payment. They extend to the steps taken by the Bank, concerning the presentation of the bill.

The second instruction asked for, is in terms which are in some degree equivocal. It may imply, either that the recourse against the drawer of the bill was not lost, or that if lost, that circumstance would not entitle the plaintiff to recover against the Bank; as its decision is not essential to the cause, it will be passed over.

The third is more specific. The Court is asked to say, that the failure of the Bank to give notice to the drawer, that the drawee was not found at home, when called upon to accept

the bill, is not such negligence as discharged the drawer from his liability, and entitles the plaintiff to recover.

The question suggested by this prayer, is one on which no decision is found in the Books. It depends on analogy, so far as it is to be decided by adjudged cases. Such a bill need not be presented; but if presented, and acceptance be refused, it is dishonoured, and notice must be given. Had the Bank taken no step whatever to obtain an acceptance, no violation of duty would, according to these decisions, have been committed.— Can any unsuccessful attempt to do that which the law does not require, place the agent in the same situation that he would have stood in, had the drawee been found, and had positively refused acceptance? Absence from home, with a failure to make provision for payment when a bill becomes due, is a failure to pay; but absence from home when the holder of a bill or his agent offers it for acceptance, is in no respect culpable. Had the drawee received advice of the bill, he could not have not known, that it would be presented for acceptance, because the law did not require it, and is consequently not blameable for his absence, when the officers of the Bank came to present it for acceptance. Had the bill, under such circumstances, been protested for non-acceptance, and returned, the drawer might not have been liable for it.

The bill, then, on general principles, ought not to have been protested; and the absence of the drawee, ought not to be considered as equivalent to his refusal to accept. It might have been a prudent precaution, to have given information that the bill was not accepted, because the drawer had not been found, but we cannot say, that the omission would subject the agent to loss, unless such was the special usage of this bank.

4. The fourth prayer is for an instruction to the jury, that, if they believe, from the evidence, that the defendants conformed to their former usage, in regard to such bills, in calling on the drawee for acceptance, (the said drawee being from home,) and not noting the same as dishonoured, and giving notice thereof to the parties on the said bill, then, their failure to treat the said bill as dishonoured, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof, from his liability to the plaintiff.

The Court has already indicated the opinion, that this omission to treat the bill as dishonoured, in consequence of not finding the drawee at home, if the usage of the bank was not to notice such a circumstance, did not discharge the drawer; consequently, this instruction ought to have been given, unless it should be supposed foreign to the case in which it was asked. In a suit brought by the holder against the bank, the

Court was not bound to declare the law as between the holder and the drawer, unless the liability of the bank was determined, by the liability of the drawer. Although in the general, the one question depends on the other, yet, it may not be universally so. The bank was the agent of the holder, not of the drawer, and might consequently so act, as to discharge the drawer, without becoming liable to its principal. In this case, however, as the agent received on specific instructions, but was left to act according to the law merchant; a course of proceeding which did not discharge the drawer, could not render the agent liable to the principal. This prayer was, therefore, essentially the same with that which preceded it, with this difference. The third prays an instruction, whatever might be the usage of the bank; the fourth prays essentially the same instruction, provided the conduct of the bank conformed to its usage. This instruction, therefore, ought to have been given, as prayed. Upon a review of the whole case, the Court is of opinion, that, if the bank acted in conformity with its established usage, in not noting the bill, and giving notice thereof, when the ineffectual attempt was made to present it for acceptance, this action could not be supported. With respect to this usage, the testimony is contradictory, and ought to have been submitted to the jury, in conformity with the last prayer made by the counsel for the bank. The Court erred, in not giving this instruction, as prayed. The judgment, therefore, is to be reversed, and the case remanded for a new trial.

This cause came on, &c., on consideration whereof,—This Court is of opinion, that the Circuit Court erred, in refusing to instruct the jury, that if they believed that the defendants conformed to their former usage, in regard to such bills as the one in question, in calling on the drawee for acceptance, (the said drawee being from home,) and not noting the same as dishonoured, and giving notice thereof to the parties on the said bill, then, their failure to treat the said bill as dishonoured, and to give notice accordingly, of non-acceptance, did not discharge the drawer thereof from his liability to the plaintiffs.—It is therefore considered by the Court, that the said judgment be reversed and annulled, and that the cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*, and to proceed therein according to law.

GEORGE R. GAITHER, PLAINTIFF IN ERROR, *vs.* THE FARMERS AND MECHANICS BANK OF GEORGETOWN, (FOR THE USE OF THOMAS CORCORRAN,) DEFENDANTS IN ERROR.

C. & Co. discounted their notes with the F. and M. Bank of Georgetown, at thirty days; and, in lieu of money, they stipulated to take the post notes of the bank, payable at a future day, without interest, while post notes were at a discount of one and one half per cent. in the market, at the time of the transaction. Such a contract is usurious. The endorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the endorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. {43, 44}

When an action is in its origin instituted in the name of A, for the use of B, the *cestui que use*, is, by the law of Maryland, regarded as the real party to the suit. {42}

If a note be free from usury in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury, although an endorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain a suit upon it. {43}

The Act of Assembly of Maryland, declares "all bonds, contracts, and assurances whatever, taken on an usurious contract, to be utterly void." And the endorsement of a promissory note, for a usurious consideration, is a contract within the statute, and was void. {43}

THIS suit was instituted by the defendants in error, against George R. Gaither, as the drawer of a promissory note, dated Georgetown, 24th July 1822, for 1513 dollars 96 cents; payable six months after date, to the order of W. W. Corcorran & Co. Endorsers, W. W. Corcorran & Co., and Thomas Corcorran. Before the swearing of the jury, in the case, it was stated, by the counsel of both plaintiff and defendant, to one of the Judges of the Court; who, being a stockholder in the bank, objected to sitting in the case; and the same was also stated to the Court, before the jury was sworn; that the bank was not interested in the event of the cause; and, on the trial, it was also shown to the Court, by the clerk, that this suit, standing on the docket in the name of the bank, was, by direction of the plaintiff, on the morning of, and just before the cause was called for trial, entered for the use of Thomas Corcorran; and the jury were sworn to try the cause standing on the docket, to the use of Thomas Corcorran.

W. W. Corcorran & Co., merchants of Alexandria, were in the frequent receipt of large discounts from the bank, upon their own notes, endorsed by Thomas Corcorran, for which

other notes payable to them, were, from time to time, deposited in bank, as collateral securities for the notes discounted; which collateral notes, were kept in deposit by the bank, and, as collected, were passed to the credit of the borrowers; and the collateral notes, a short time before they became due, were so entered in the deposit book of the bank, as that the bank became the collectors upon their own account, of their respective amounts, to be appropriated as stated.

The note of the plaintiff in error was treated in this manner; and, before it became due and was protested, it had been entered on the deposit book of the bank, and had remained in possession of the bank, until the day of the trial of the cause. The discounts of the bank for W. W. Corcorran & Co., were not, generally, to a large extent in cash; but when large discounts were made, it was with an understanding, that the proceeds of the same should be received in post notes, having some time to run, without any rebate, for the time being allowed by the bank, but the bank retaining the usual discount of six per cent. per annum, on the amount of the discounts; and the post notes were made payable at various periods, from twenty to ninety days, but most generally payable when the note discounted, or the note received, as a collateral security, became due. The amount of discounts received by W. W. Corcorran & Co., from the 24th of July 1822, to the 22d of February 1823, was 77,732 dollars; and, during that time, the post notes issued for their use, by the bank, exceeded 59,000 dollars.

The post notes, at the time they were received, were at a discount of one per cent. per month in the market; and some of those received by W. W. Corcorran & Co. were sold at that rate. The bank always held the note of the defendant below, as a collateral security for the notes discounted for W. W. Corcorran & Co.; and the defendant paid to the bank, on the 1st day of February 1823, 500 dollars, on account of the note. Within two days of the trial, when the bank having collected as much money as reduced the debt due by W. W. Corcorran & Co. to a small sum; they ordered the suit to be marked for the use of Thomas Corcorran, under authority of an order, dated February 17th 1823, signed by W. W. Corcorran & Co., "to deliver to him what notes of theirs might remain in possession of the bank, after the debt due by them, for which they were left as collateral security, should be paid."

The defendant below, also proved, that the name of Thomas Corcorran was not upon the note when it was passed to the bank, nor until after the note became due; and he produced, and offered in evidence to set off the promissory notes of W. W. Corcorran & Co., which had been transferred to him,

(Gaither vs. The Farmers & Mechanics Bank of Georgetown.)

by the payee thereof, after the note upon which this suit was brought had been transferred to the bank, but before this suit was brought, and before they fell due, which was after the 17th of February 1823.

The plaintiff below, offered W. S. Nicholls, admitted to be one of the stockholders of the bank, as a witness, who was objected to, as being interested in the event of the suit; but the Court overruled the objection, and he was sworn and examined. The defendants prayed the Court to instruct the jury, that, if they believed the evidence of the transaction between the bank and W. W. Corcorran & Co. were usurious, the plaintiff could not recover; which instruction the Court refused to give. The Court refused to suffer the defendants to give the evidence of set off, which they proposed to exhibit. To these decisions of the Court, a bill of exceptions was tendered, and the case was brought up to this Court by writ of error.

Mr. Taylor, and Mr. Key, for the plaintiff in error.—

The admission of W. S. Nicholls as a witness, was erroneous, on two grounds.—

1. He was interested in the event of the suit;—2. He was one of the parties, plaintiff, on the record, he being a stockholder in the bank.

1. The suit was originally brought for the use of the Mechanics Bank of Alexandria, and the bank is responsible for the costs of suit, to which the witness will, as a stockholder, be obliged to contribute, on the failure of the suit. 2 *Camp.* 354. *Phillips's Evid.* 57. Under the law of Maryland, the party to whose use the suit may be brought, is liable for costs; but he is only a security for the costs with the nominal plaintiff. The declaration of the counsel, that the bank had no interest in the cause, was made in order to induce the judge, who was a stockholder, to sit, and whose high character, placed him above the influence of interest. It was not intended to authorize the introduction of an interested witness, as to the effect of the declaration of parties or counsel. 1 *Stark. Pt.* 4. 34.

2. If this suit can be sustained, it must be upon a legal title of the Bank in the note; and as the note was made payable to W. W. Corcorran & Co., they must have endorsed it to the Bank, in the course of their transactions with the Bank, and for an usurious consideration. The facts make out a case from which the jury might have presumed usury, and there is nothing which will prevent the plaintiff in error from availing himself of this defence. They show that the notes of W. W. Corcorran & Co. were discounted by the Bank, and no money paid for them, but the proceeds of the discount were paid in post notes, generally payable when the notes discounted

by the Bank became due, and upon which no rebate or reduction was made for the times the notes had to run. In the course of these transactions, and as a part of them, the note of the plaintiff in error, was endorsed over to the Bank by the borrowers upon these usurious contracts. This was usury. *Chitty on Bills*, (Philadelphia edition, 1821,) 112. The statute makes the contract upon which usury is taken, void; and no title can be obtained under it. It is not the validity of the note which is questioned, but that of the transfer of the note by the endorsement. The plaintiff in error is liable to pay the note, but not to those who claim under an invalid transfer of it; no one can claim under such an endorsement. 1 *Starke's Reports*, 385; *Chitty*, 105, 692. The Bank having held the note under an invalid transfer, and instituted a suit upon it, the case cannot be altered, as to the right of the person to whose use it is marked. This change in the suit does not alter the relations of the parties, and give a right to the *cestui que use* which the plaintiffs in the suit did not possess. The whole of the evidence shows that the Bank held the note for their own use. That it became theirs, through the usurious dealings with W. W. Corcorran & Co. and they could pass no right in it to any person.

3. Upon the evidence, the set-off ought to have been admitted. The law of Virginia authorizes a set-off to be allowed in such a case. A set-off is allowed against the party really claiming in the suit, although another may be nominally the plaintiff. *Chitty*, 12. 1 *T. Rep.* 39. 4 *T. Rep.* 341. 7 *T. Rep.* 663. 16 *East*, 36.

Jones & Coxe, for the defendants in error.—

The question as to the interest of the Bank in the event of the suit, and therefore of the compelling of W. S. Nicholls, as a witness, was closed by the declarations of the counsel, before the cause came on for trial. The counsel had power to bind the parties by their admission, and the Court below was bound to consider any thing done to release the interest of the Bank that could be done. The real party to the suit was the *cestui que use*, and by a court of law he would be so treated; and he has full power over the cause, in the same manner as if he was the only party on the record. As to the nature of the interest of a witness who is nominal plaintiff.— 4 *Stark*, 751. 770. 775, 776. When a corporation can be a witness. 4 *Stark*, 1061. 426. By the laws of Maryland, 1796. chap. 43, sec. 13. the party for whose use the suit is marked, is liable to costs. 1 act of 1794, chap. 54, sec. 10.

The Bank held the note of Gaither, as trustees for W. W. Corcorran & Co., and the stockholders would have no interest in the same.

(Gaither vs. The Farmers & Mechanics Bank of Georgetown.)

2. If there was usury between W. W. Corcorran & Co. and the Bank, it cannot affect the claim in this suit. An usurious transaction between the drawer of a note and the endorsee, will not discharge the drawer; and the only danger to which he would be exposed, might be that of a double recovery. 1st, by the drawer, who had not legally passed away the note, and 2d, by the usurious endorsee.

The law is settled, that the usury must affect the original contract, and will not affect collateral matters growing out of it. When given originally for an usurious consideration, all are affected by it; but the usury must have attached to the instrument itself, and it will not affect one given in lieu of it to a person who was ignorant of the usury at the inception of the first contract. 3 *Esp*: 22. 8 *T. Rep.* 390. 1 *Camp.* 165, in note. Philadelphia edition of *Chitty on Bills*, of 1817, page 95.

3. The note was never the property of the Bank, it having been deposited as a collateral security for notes drawn by W. W. Corcorran & Co. and endorsed by Thomas Corcorran. The note was not deposited in reference to any particular negotiation, but as a security generally; and the right of the Bank to it, if any existed, was not affected by subsequent transactions, although usurious. *Ord on Usury*, 104.

4. The set-off was not admissible. It was not the subject of notice or plea—and the interest of Thomas Corcorran had attached, before any of the claims of the plaintiff in error arose.

Mr. Justice JOHNSON delivered the opinion of the Court.—

The plaintiff here was defendant in the Court below, to an action instituted by the Farmers and Mechanics Bank of Georgetown, on a note made by him to W. W. Corcorran & Co. and by them endorsed in blank to the Bank.

The record makes out a case for this Court, of which the following is a summary: That W. W. Corcorran & Co. discounted their own notes with this Bank, at thirty days; the Bank expressly stipulating, that in lieu of money they should receive what they call a post note of their own, payable at a future day, without interest. The evidence would make out that the post notes given for this discounted note, were at thirty-five days after date; that it is, two days after the discounted note fell due; so that in fact there was no advance of money, although an interest of six per cent. per annum, was taken from the Corcorrans, and the post notes of the Bank were proved to be at a discount of one per cent. making one and a half per cent. for thirty days, or eighteen per cent. per annum. The note on which this suit was instituted, was passed to the Bank as a collateral security for the discounted note, and was altogether unaffected with

usury in its origin. The ground on which the right of the Bank is resisted, is, not that Gaither is discharged from his contract with W. W. Corcorran & Co., but that the endorsement to the plaintiff below, having been made to secure a note given on an usurious contract, could vest no interest or cause of action in the endorsee. In order to avoid the pressure of this defence in the Court below, the plaintiffs there gave in evidence a writing, addressed by W. W. Corcorran & Co. to the Bank, bearing date 17th February, 1823, prior to the institution of that suit, in these words: "Please deliver to Thomas Corcorran what notes of ours may remain in your possession, after the debt due the Bank, for which they are left as collateral security, shall have been paid, or hold the same subject to his order." And it was further shown, that a few days before the issue was tried below, an adjustment had taken place between the Bank and Thomas Corcorran, (who was then endorser and assignee of W. W. Corcorran & Co.) upon which Gaither's note had been delivered to Thomas Corcorran; he then endorsed his name on Gaither's note, below that of W. W. Corcorran & Co. and thereupon the Bank, before the jury were charged, had the name of Thomas Corcorran entered on the docket, as the *cestuy que use*, for whom they were prosecuting their suit, and the jury, it appears, were charged with the cause, according to the exhibition of parties, thus made upon the docket; that is, to try an issue between the Bank, to the use of Thomas Corcorran, plaintiff, and Gaither, defendant.

This practice is familiar with the Maryland Courts, and when the action originates in that form, the *cestuy que use* is regarded as the real party to the suit.

It is now contended, that, although substituted at the eleventh hour, Thomas Corcorran is to be regarded in that relation; and under that idea this cause has been argued, as though the question of usury had been raised between Gaither and an innocent endorser.

But it is obviously impossible, in the present action, to pay any regard to Thomas Corcorran's interest or claims. The arrangement which introduced his name into the cause, was too obviously concocted for the purpose of rescuing the interests of the plaintiffs in the record, from the effects of the defence of usury. It therefore can pretend to no merit in the administration of justice. But if the effects of that transaction be examined, without reference to the motive, it is equally clear, it can have no bearing upon the present action. The interest in, or power over Gaither's note, was only inchoate, and contingent, until all the debts due the Bank should be paid, or they otherwise be induced to relinquish it to him; and this did

not take place until long posterior to the institution of the suit, and even after issue joined.

The Bank sue on their own interest, declared on their own right, and acknowledge no participation with Thomas Corcorran in the interest or the action, until the moment when the cause is going to trial. It was surely then too late to permit them to assume a new character, or interpose a new party; however liberally this Court might be disposed to sacrifice the forms and rules of law, to the Maryland practice.

We will, therefore, put Thomas Corcorran's interest out of view, and will consider the parties, at the commencement of the action, as the parties at its close.

This puts the question on the right of an innocent endorser, out of the cause—since the endorsee of Gaither's note received the usurious interest, and the endorser paid it. The only questions on the point of usury, then, are,

1st, Whether Gaither, in the relations in which he stood to these parties, could set up the usury in his defence.

2d, And whether that defence could be set up, after payment of the note on which the usury had been received.

The objection in the first point, is, that as there was no usury in the concoction of Gaither's contract, he ought not to be permitted to avail himself of the usurious contract between the endorser and endorsee, to avoid a debt which he justly owes.

And this is unquestionably true: for the rule cannot be doubted, that if the note be free from usury, in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury. Nor does Gaither propose by this defence, to relieve himself from paying the note; it goes only to his liability to pay it to this individual; and reason, analogy, and adjudged cases, will sustain the defence. Suppose a note given to a woman, who marries, and then endorses it without her husband's authority; such endorsement would be void; (1 *East*, 432,) and the endorsee could not recover, yet the husband and wife may recover.

In a comment on the case of Jones and Davison, in Holt's Reports, (1 *Holt*, 256,) an usurious note is likened to a bill of exchange on a bad stamp. If a stamp were necessary to give validity to an endorsement, it cannot be doubted that none who claim through such an endorsement could maintain an action against the drawer. The endorsement, though actual, was ineffectual for the purpose of transferring an interest in the note. It was a void act.

This case is governed by the laws of Maryland: and the Act of Maryland against usury is in the words of the Statute of Ann. It declares, "All bonds, contracts, and assurances what-

(Gaither *vs.* The Farmers & Mechanics Bank of Georgetown.)

ever, taken on an usurious contract," to be utterly void. Now the endorsement of a negotiable note creates several contracts; and if, in this case, it could give a right of action against Gaither, the drawer, it ought also to sustain an action against W. W. Corcoran & Co. the endorsers; but against them, it is perfectly clear that an action could not be maintained, for they were parties to the usurious loan. It follows, that their endorsement was a void act, and the property, and of consequence, the right of action, never passed to these plaintiffs.—There is a very strong case, on this subject, which we believe was not quoted in argument, to be found in the Books to which we usually refer. We mean the case of Harrison & Hamell, in Taunton's Reports, (5 *Taunton*, 780,) in which the rights of a collateral surety to avail himself of usury in the original transaction, is distinctly recognised, when the contract of the collateral was wholly unaffected by usury. The case was reserved for argument, and the whole Court concurred in the legality of the defence. The language of the Judges is strong, and applies to the case before us. One of them remarks:—"That if a man lends 1000 pounds on an usurious interest, and gets from a third person a collateral security for 800 pounds only, without usurious interest, I hold that bond is void, not because it is given for securing usurious interest, but because it is given for enforcing a contract for usurious interest." And another says, "That if giving these collateral acceptances would alter the case, it would be a shift or device, by which the statutes of usury would be defeated."

With regard to the second point, it is necessary to see the force of the argument which would deduce from the payment of the discounted note, a cure to the taint with which the contract of endorsement was affected. The law declares it absolutely void. By what operation, then, is it to be rendered valid by the payment of the discounted note? It is argued, by the payment and extinguishment of the latter note, the usury is extinct, and as if it had never existed. We cannot perceive how this reasoning can prevail, either in point of fact or inference. In point of fact, the crime was only consummated by the payment of that note, since the bank thereby incurred a liability under the statute, to be sued for three times the sum paid them; and as to the inference, it seems very difficult to conceive how the payment of the usurious note should operate to confirm or give birth to a contract which the law declares never had existence, and was *ab initio*, utterly null and void. There have been cases in which usurious contracts have been cancelled, the usury refunded, and new contracts substituted free from the taint of usury; and the law gives to the offender this *locus penitentiæ*. But there is no analogy between such a

(Gaither vs. The Farmers & Mechanics Bank of Georgetown.)

transaction and that here presented, in which the money loaned has been paid by the borrower, and only passed into the vaults of the Bank, to be deposited with the usurious interest previously taken. We have not heard of the refunding of this usury; and this, at least, would have been indispensable to removing the taint. But even that would never have given validity to an endorsement, which, in the eye of the law, was, as though it had never existed.

As the decision on this point disposes of the right of action, and leaves no probability that the cause will be again brought up to this Court, we deem it unnecessary to notice any other of the points made in argument.

The judgment was reversed, and the cause remanded to the Circuit Court, with directions to award a *venire facias de novo*.

GEORGE MINOR, PHILIP H. MINOR, DANIEL MINOR, WILLIAM MINOR AND SMITH MINOR, PLAINTIFFS IN ERROR, *vs.* THE MECHANICS BANK OF ALEXANDRIA, DEFENDANTS IN ERROR.

It is a general rule, in the construction of public statutes, that the word "may," is to be construed "must," in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. And in all cases, the construction should be such as carries into effect the true intent and meaning of the legislature in the enactment. {64}

The provision in the Act of Congress, incorporating "the Mechanics Bank of Alexandria," which requires, that the capital stock of the bank shall consist of 50,000 shares, of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number of shares. {65}

Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain that such a fraud, which was private, between the original subscribers to the stock and the commissioners, could be set up to the injury of subsequent purchasers of the stock, who became *bona fide* holders of the same, without participation, or notice thereof. {66}

The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. {67}

What defects in pleading are, and are not, cured by verdict. {67}

The condition of an official bond, that the officer who gives it, shall "well and truly" execute the duties of his office, includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully; if they are violated from want of capacity or want of care; they can never be said to have been "well and truly executed." {69}

The officers of a bank are held out to the public, as having authority to act according to the general usage, practice, and course of their business; and their acts, within the scope of such usage, practice, and course of business, would, in general, bind the bank in favour of third persons, possessing no other knowledge. {70}

No act or vote of the Board of Directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, will justify the Cashier of the bank in acts which are in violation of the stipulation in his official bond, "well and truly" to execute the duties of his office. Acts done by a Cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the Cashier and of his sureties. {71}

The official bond of the Cashier, must be construed to cover all defaults in duty, which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank; and the sureties in the bond are presumed to enter into a contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws. {73}

On a joint and several bond, the plaintiff may sue one or all of the obligors;

but, in strictness of law, he cannot sue an intermediate number. He must sue all or one. But if such error is not taken advantage of by plea in abatement, it is waived by pleading to the merits. {73}

According to modern decisions, a *nolle prosequi* does not amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. {74}

In an action on a joint and several bond, some of parties' sureties, severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards the principal was called upon to plead, and he did so—judgment was then entered against the sureties, and a *nolle prosequi* entered against the principal. To this judgment, or the proceedings, no exception was taken in the Court below, nor was a new trial asked by the sureties. The Court held, that there is no decision exactly in point to the case; that there is no distinction between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case. The decisions of the Courts of the United States, upon this proceeding, have been on the ground that the question is matter of practice and convenience. {75}

When the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed against one defendant. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice. {80}

AN Act of Congress was passed on the 16th of May 1812, entitled "An Act to incorporate a bank in the town of Alexandria, by the name and style of the Mechanics Bank of Alexandria;" which institution soon afterwards went into operation; subscriptions for filling up the capital stock of the corporation and bank, having been opened in the town of Alexandria, on the first Monday in June 1812, under the direction of fifteen commissioners, appointed for that purpose. On the 3d of September 1817, Philip H. Minor was elected Cashier of the bank; and, on the same day, by a resolution of the Board of Directors, it was ordered, "that the present officers of the bank, do the whole duties of the bank."

In the office of Cashier Philip H. Minor was the successor of William Patton junr., who diedin August 1817; and, before his appointment as Cashier, Philip H. Minor, (who had several years preceding served as an officer of the bank, for some time as discount clerk, and afterwards as book-keeper;) had, in March 1817, been appointed teller for one year, ending in March 1818, from the time of his appointment; and had given approved bond and security, conditioned that he would well and truly execute the duties of the office of teller. After the appointment of Philip H. Minor, in September 1817, to be Cashier of the bank; and the order of the Board, on the same day, relative to the whole duties of the bank being performed by the then officers of the bank; no renewal of the appoint-

ment of teller was made, and he usually performed the duties of Cashier and teller.

On the 19th day of March 1818, Philip H. Minor, and the plaintiffs in error, executed a joint and several bond, in the sum of twenty thousand dollars, which contained the following condition:—

"Whereas the above bound Philip H. Minor, hath been duly elected to the office of Cashier of the Mechanics Bank of Alexandria, the conditions of the above obligation are such, that, if the above bound Philip H. Minor, shall well and truly execute the duties of Cashier of the Mechanics Bank of Alexandria, then, this obligation to be void, but otherwise, shall remain in full force and virtue in law.

"PHILIP H. MINOR, (L. S.)
"GEORGE MINOR. (L. S.)
"D. MINOR, (L. S.)
"WILLIAM MINOR, (L. S.)
"SMITH MINOR." (L. S.)

In the Circuit Court of the district of Columbia, for the county of Alexandria, the defendants in error instituted an action of debt upon this bond, against all the obligors; and the declaration filed in the same, was for the penalty, without taking notice of the condition.

Oyer of the bond and condition having been prayed, &c., the defendants being the sureties of Philip H. Minor, to wit: George Minor, Daniel Minor, William Minor, and Smith Minor, pleaded joint pleas, separate from Philip H. Minor, the Cashier of the bank. The substance of these pleas was as follows:—

1. The Mechanics Bank was not competent to sue, because the commissioners, who, by the Act of Incorporation, were authorized to open and take subscriptions to the capital stock of the company, and who took the subscriptions, had colluded with the subscribers to the stock, and that 180,000 dollars of the stock, had been fraudently subscribed; and that an election for directors of the bank was fraudulently and illegally held, by which the persons named as commissioners, were elected the directors of the bank; the votes of the fraudulent holders of the stock, amounting to 180,000 dollars, having been taken at the said election;—that afterwards, the sums paid by the fraudulent or collusive holders of the 180,000 dollars stock, were, by the President and Directors, paid back to them; and thereby the capital was diminished to 320,000 dollars; and, by the said proceedings, the capital stock of the bank was reduced below 500,000 dollars, as was collusively held out

to the public; without this, that the plaintiffs, the obligees in the bond, or any other person whatsoever, at the time and times of making the said bond, and of commencing the suit thereon, or at any time whatsoever used, claimed, or exercised, or yet use, claim, or exercise, the name and stile, privileges and capacities, of the said supposed corporation, or ever claimed to compose the same, otherwise, or by any other ways or means, or in any other manner or form whatsoever, than in virtue of the said subscription, conducted and concluded as aforesaid; and so the said defendants say, the said supposed writing, obligatory in manner and form aforesaid made, is utterly inoperative and void in law; and this, they are ready to verify, &c.

The second plea states, that the defendants ought not to be charged, &c. &c., because the plaintiffs demand the said debt, and bring this action, as pretending and claiming to be a corporation aggregate, in and by virtue of the Act of Congress, mentioned in the first plea, by the name of the Mechanics Bank of Alexandria, to be composed of the subscribers to the said Mechanics Bank of Alexandria, which subscribers were not in being at the time of the passing of the said Act, but were to be composed of such persons only, as thereafter might subscribe thereto, according to the provisions of the Act; whereas the subscriptions were not taken according to the said provisions, so as to entitle the persons pretending to be subscribers to the said Bank, and their successors and assigns, to compose the said corporation, wherefore there was not any person authorized, or lawfully competent to take the bond, which is the subject of this suit; nor was there any such person, at the commencement of this suit, capable of instituting and prosecuting the same, but that the said persons did, unjustly and illegally arrogate to themselves to compose the said corporation, without the capital stock having been filled by subscription, or the supposed corporation having been composed of actual subscribers to the Bank, pursuant to the directions of the said Act of Congress, or other lawful warrant whatsoever, contrary to the purview and effect of the said Act of Congress; and so the defendants say, that the said writing obligatory, was, at the time of making the same, and is, utterly void in law, &c.

The third plea alleged that the Cashier had well and truly performed the condition of the bond, according to the tenor and effect, and the true intent and meaning of it.

The fourth plea alleged that the Cashier had performed the condition of the bond, "to the best of his ability, skill and judgment," without any fraud, deceit, or wilful default, or breach of duties, whatever.

The fifth plea alleged that the Cashier had performed his du-

ties, in obedience to, and in pursuance of, the rules, orders, usages and customs of trade and business, ordained, established, and practised in the Bank, by authority of the President and Directors thereof.

The sixth plea asserts, that although the duties of the Cashier had not been performed by him, yet the non-performance was by the wrong, connivance and permission of the President and Directors of the institution.

The seventh plea states, that the Bank had not been damnified by the acts of the Cashier.

The eighth plea was, that although the Bank was damnified by the acts of the Cashier, yet it was by the wrong and connivance of the President and Directors, &c.

The ninth plea states that the business and affairs of the Company, and the conduct and duties of the Cashier, were performed under the regulation and management of the President and Directors, who had been chosen according to the provisions of the Act of Incorporation; and if, at any time, the corporation has sustained damage, since the making of the writing obligatory, by reason of any matter contained therein, it has been by the wrong, connivance or permission of the said President and Directors.

To the first and second pleas, the plaintiffs below put in general demurrers, and on each of the seven remaining pleas, issue was taken by general replications; all precisely in the same terms, as follows:

"And the said Mechanics Bank of Alexandria, by Thomas Swann, their attorney, say they ought not to be precluded, &c. because they say that the said cause of action, in the declaration mentioned, did accrue as in the said declaration and breaches are set forth; without that, that the matters set forth in the said plea, are true; and this they pray may be inquired of by the country, and the defendants likewise."

But at the next term, the plaintiffs withdrew these general replications as to the 3d and 4th pleas; and to these two pleas put in special replications, leaving the issues on the remaining five to stand on the general replications and issues as above.—The replications thus put in to the 3d and 4th pleas, and rejoinders of the defendants, taking issue upon the same, (being precisely in the same terms, *mutatis mutandis*, to each,) were as follows:

"And the said Mechanics Bank of Alexandria, by Thomas Swann, their attorney, say, that they ought not to be precluded from having and maintaining their action aforesaid against the said defendants, George Minor, Daniel Minor, William Minor, and Smith Minor, by any thing alleged by the said defendants in their third plea, pleaded as aforesaid: Because they say

that the Board of Directors of the said Mechanics Bank of Alexandria, in pursuance of the authority granted to them by the Act of Congress, incorporating the said Bank, did duly make and declare sundry by-laws for the government of the said Bank, its officers and affairs, and, among other laws so made and declared as aforesaid, they did enact and declare, in substance, as follows, to wit:

Section 2d, article 5th. It shall be the duty of the Cashier to countersign, at the Bank, all the bills or notes to be signed by the President, by order of the Directors; carefully to observe the conduct of the persons employed under him; duly to examine into the settlement of the cash account at the Bank; count the money deposited in the vaults every evening; *compare* the amount thereof with the *balance* of the cash account of that day, and, in case of disagreement, report the same to the next meeting of the Directors; to see that all deeds appertaining are duly recorded; and to do and perform all other duties that may, from time to time, be required of him by the President or Board of Directors relative to the affairs of the institution.

Article 6th. It shall be the duty of every other officer, clerk, and servant of the Bank, to do and perform all other duties, that may, from time to time, be required of them respectively, by the President and Cashier; and in no case to divulge the transactions of the Bank.

Article 8th. That no officer of the Bank, the President excepted, shall leave the Bank after it closes, until the Cashier's account shall be found to agree, or if it does not agree, until a strict examination be made to discover the error.

Section 3d, Article 3d. That no discount shall be made without the consent of a majority of the Directors present; nor shall any reason be required by the Directors to each other, nor assigned to the public, for refusing discounts.

Which said by-laws, so made, enacted, and declared, as aforesaid, were, at the time of the sealing and delivery of the writing obligatory, in the declaration mentioned, in full force and effect. And the said plaintiffs say, that the said Philip H. Minor, in the said writing obligatory mentioned, was duly appointed Cashier of the said Mechanics Bank of Alexandria; and, in virtue of his said appointment, did accept the office of said Cashier; and, on the day of the date of the said writing obligatory in the declaration mentioned, did thereupon enter upon the duties of the said Cashier; and the said plaintiffs further say, that the said Philip H. Minor did not well and truly execute the duties of the said Mechanics Bank, as Cashier of the said Bank, according to the true intent and meaning

of the condition of the said writing obligatory, but violated his duty as Cashier aforesaid, and broke the condition of the said writing obligatory, in the following instances: that is to say,

1. That, during the period that the said Philip H. Minor acted as Cashier of the said Mechanics Bank, under the writing obligatory, as aforesaid, he, the said Philip, as Cashier aforesaid, received into his custody, and keeping the moneys of the said Bank, amounting to very large sums: that is to say, amounting altogether to five hundred thousand dollars and upwards; which said moneys, so received as aforesaid, the said Philip, although often required, hath failed to account for, or to pay over to the said Bank, or to make a correct report of the same, from time to time, to the Board of Directors of the said Bank.

2d. And further, that he, the said Philip, during the period aforesaid, and in his capacity of Cashier aforesaid, wrongfully, and contrary to the duty of his office of Cashier aforesaid, did waste, and suffer to be wasted, of the moneys of the said Bank, in his care and custody, as Cashier aforesaid, the sum of thirty thousand dollars and upwards, whereby the same became entirely lost to the said Bank.

3d. And the said plaintiffs further say, that the said Philip, during the period aforesaid, and in his capacity of Cashier aforesaid, wrongfully, and contrary to the duty of his office of Cashier aforesaid, and without the authority of the said Bank, did apply and appropriate, of the proper money of the said Bank in his care and custody, as Cashier aforesaid, to his own proper use, the sum of five thousand seven hundred and twenty-eight dollars, and to the use of Thomas J. Minor and himself, the said Philip H. Minor, the further sum of

$3,179.00	
1,898.63	
5,077.63	

so that the said sums were entirely lost to the said Bank.

4th. And the plaintiffs further say, that the said P. H. Minor, during the period aforesaid, and in his capacity of Cashier aforesaid, wrongfully and contrary to the duty of his office of Cashier aforesaid, and without the authority of the said Bank, did pay away, and did suffer and permit to be paid away, of the proper moneys and funds of the said Bank in his care and keeping, as Cashier aforesaid, to Jabez B. Rooker, divers sums of money, amounting altogether to the sum of 4,967 dollars 30 cents; and to one Francis Adams, divers others sums, amounting altogether to the sum of 1,884 dollars 18 cents; and to William F. Thornton divers other sums of money, amounting altogether to the sum of of 7,407 dollars 25 cents; and to Benjamin G. Thornton divers other sums of money, amounting altogether to the sum of 4,810 dollars 74 cents; and to Lewis

Hipkins the sum of 2,375 dollars; and to Robert Young divers other sums of money, amounting altogether to the sum of 9,294 dollars 44 cents; so that the said several sums of money were entirely lost to the said Bank.

5th. And the said plaintiffs further say, that the said Philip H. Minor, during the period aforesaid, and in his capacity of Cashier aforesaid, and without the authority of the said Bank, did endorse upon a certain check, drawn by Lewis Hipkins upon the said Mechanics Bank, in favour of "note in city or bearer" for 3000 dollars, that the same was "*good;*" when in fact and in truth, the said Lewis Hipkins had no money or funds in the said Mechanics Bank, at the time of the said endorsement, to pay the said check, nor has he, at any time since, had in the said Bank any money or funds to pay the said check, so endorsed as aforesaid, and the said Bank have actually paid and taken upon themselves the payment of the same.

7th. And the said plaintiffs further say, that Benjamin G. Thornton, on the 18th day of December, 1818, drew a certain bill or draft upon a certain Bank in the state of Ohio, called the Bank of New Lancaster; which bill or draft was in substance as follows:

"ALEXANDRIA, *December* 18, 1818. Cashier Bank of New-Lancaster, Ohio. Pay to the order of W. F. Thornton, ten days after sight, four thousand seven hundred and fifty dollars, and charge the same as per advice, to yours, &c.

B. G. THORNTON."

And the said plaintiffs say, that the said Philip H. Minor, while he acted as Cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to the duty of his office of Cashier aforesaid, and without the authority of the said Bank, did advance and pay, upon the credit of the said draft or bill, to William F. Thornton and Lewis Hipkins, the amount of the said draft: that is to say, the sum of 4750 dollars; by means of which said advancement, so made as aforesaid, the said sum has been entirely lost to the said Bank.

8th. And the said plaintiffs further say, that the said Philip H. Minor, while he acted as Cashier aforesaid, under the writing obligatory aforesaid, wrongfully, and contrary to his duty as Cashier, and with a view to deceive and mislead the Board of Directors of the said Bank, did make sundry false and erroneous entries in the books of the said Bank, in his care and custody as Cashier aforesaid; and among others, the following, to wit: a charge against the Bank of Alexandria, of the date of the 31st of August, 1818, for the sum of 1791 dollars; and another against the Bank of Potomac, of the date

of the 31st of August, 1818, for the sum of 2581 dollars 25 cents; and another against the Bank of Washington, of the date of the 2d of March, 1818, for 1000 dollars; when in fact and in truth, at the periods aforesaid, there was nothing due from the said last mentioned Banks to the said Mechanics Bank; by means of which said false entries and charges, the said Mechanics Bank have lost the said several sums of money. All which said several matters and things the said plaintiffs are ready to verify. Wherefore, &c.

To these pleas, the plaintiffs in error put in the following replication:

"And the said defendants, George Minor, Daniel Minor, William Minor, and Smith Minor say, that the said Mechanics Bank of Alexandria ought not to have, or maintain, their aforesaid action against the said defendants, by reason of any thing by the said Mechanics Bank of Alexandria, in their said replication to the said third plea of the defendants, above in replying alleged; because they say that the said Philip H. Minor, in the said plea and replication named, did not violate his duty as Cashier aforesaid, and break the said condition of the said writing obligatory, in the instances by the said Mechanics Bank of Alexandria, in their said replication above pleaded and alleged, nor in any of them, with or by means of any fraud, or deceit, or wilful default whatsoever. And this they pray may be inquired of by the country—and the said Mechanics Bank of Alexandria in like manner."

At the same term, the demurrer to the first and second pleas, and the issues on the remaining seven, between the plaintiffs and the four *sureties*, were respectively argued and tried; the first and second pleas were adjudged insufficient, on general demurrer; the issues were found for the plaintiffs, and damages, in gross, upon all the issues and breaches, assessed against the four *sureties*, at 8607 dollars 50 cents; and, upon the motion of the plaintiffs, a rule was then laid on the principal obligor and co-defendant, *Philip H. Minor*, to plead to issue on the morrow. In compliance with which rule, he did, within the time prescribed, plead five several matters in bar; the same, *mutatis mutandis* as the third, fourth, fifth, seventh and ninth, of the aforesaid pleas, put in by the co-defendants, his sureties. A day was given at the next ensuing term, to the plaintiffs, to reply: at which term, the plaintiffs took a judgment on the judgment against the four defendants, with whom the several issues had been tried as aforesaid; and then entered a *nolle prosequi* as against the co-defendant, Philip H. Minor, who thereupon recovered judgment for costs against the plaintiffs.

On the trial of the cause in the Circuit Court, a bill of exceptions was taken to the opinion of this Court, upon certain

instructions which the Court was requested to give to the jury. The Court instructed the jury, according to the expressed desire of the plaintiffs below, except as hereafter stated, but refused to charge the jury, as requested by the counsel of the defendants.

The instructions given by the Court, on the motion of the plaintiffs' counsel, and on the evidence given in the cause, were—

1st. If the jury, from the evidence aforesaid, should be of opinion, that the said Philip H. Minor, upon his leaving the Mechanics Bank of Alexandria, that is to say, on the 9th day of March 1819, failed to pay over, or to account to the said bank, for any portion of the moneys of the said bank, received by him as Cashier of the said bank, while he acted as Cashier of the said bank, under the writing obligatory, in the declaration mentioned, then, the jury may, and ought, to infer, that the said moneys, so unaccounted for, were wilfully wasted by the said Philip H. Minor, or applied to his own use; and that, under such circumstances, the defendants are liable to the bank, for the moneys which he so failed to pay over, or account for, to the said bank.

2d. And the said plaintiffs requested the Court further to instruct the jury, that if, from the evidence aforesaid, they should be of opinion, that the said Philip H. Minor, while he acted as Cashier aforesaid, under the writing obligatory aforesaid, did wilfully pay or apply, or did, knowingly and wilfully, suffer or permit to be paid away or applied to the use of Thomas I. Minor and himself jointly, or to himself individually, any portion of the funds or moneys of the said bank, without the authority of the Board of Directors of the said bank, so that the said sums, or any part thereof, were lost to the said bank; that the said defendants are liable for the said moneys or funds so paid away, or applied and lost.

3d. And the said plaintiffs prayed the Court further to instruct the jury, that if, from the evidence aforesaid, they should be of opinion, that the said Philip H. Minor, while he acted as Cashier aforesaid, under the writing obligatory aforesaid, wilfully paid away or appropriated, or knowingly suffered or permitted to be paid away, or appropriated to the use of Jabez B. Rooker, Wm. F. Thornton, Benjamin G. Thornton, Lewis Hipkins, and Francis Adams, or to either of them, the moneys and funds of the said bank, without the authority of the Board of Directors of the said bank, so that the said moneys or funds, or any part thereof, were entirely lost to the said bank; then, the said defendants are liable for the said moneys so paid away, or appropriated, and lost.

Upon the first and second issues, being the issues under the

(Minor et al. vs. The Mechanics Bank of Alexandria.)

third and fourth pleas—and upon the third, being the issue joined on the fifth plea, the Court gave the instructions as prayed for, by the counsel for the bank. Upon the third issue, being the issue joined in the fifth plea, the Court gave the first instruction, with the addition of the following words:—"unless such failure to pay over, or account, for the money so received, by the said Philip H. Minor, was in obedience to, and in pursuance of, the directions, rules, orders, usages, and customs of trade and business, ordained, established, and practised, in the said bank, by the authority of the said President and Directors."

Upon the fourth issue, being the issue joined under the sixth plea, the Court gave the instructions prayed for, adding, in each instruction, after the words "directors of the said bank," the words, "and without the wrong, connivance, or permission, of the said President and Directors."

Upon the fifth issue, being the issue joined in the seventh plea, the Court gave the first instruction, adding the words, "if the jury should be also satisfied, by the evidence, that moneys, which the said Philip H. Minor so failed to pay over, or account for, were thereby lost to the bank;" and, upon this issue also, the Court gave the second and third instructions.

Upon the sixth and seventh issues, the Court gave the second and third instructions, adding the words, to make them applicable, to the fourth issue; and upon the sixth issue, the Court also gave the second and third instructions, adding, in each instruction, after the words "Directors of the said bank," the words, "and without the wrong, connivance, or permission, of the said President and Directors."

The counsel for the defendants, then moved the Court to instruct the jury,—

1. That if it were the established usage and practice of the said bank, that the Cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in bank; and for the Cashier to receive and pass, as cash, checks and drafts, upon other banks; and if the said balances, so appearing against the several persons above charged on the books of said bank, arose out of the exercise of such discretion, by the said Cashier, and in the course of the ordinary transactions of said bank, and pursuant to established usage and course of business there adopted, and personally known to the said President and Directors, and practised and continued, with their knowledge, for a series of years, from the commencement of the bank, to the termination of the said Philip H. Minor's cashiership; though the existence of such balances, or the particular circumstances attending them, were not formally communicated to the Board of Directors.

the jury may infer the approbation, assent, and acquiescence, of the said President and Directors, as to such usage and course of business.

2. That if the said balances, appearing against the several persons above charged on the books of said bank, arose in the course of the ordinary transactions of said bank, pursuant to the established usage and course of business there adopted, and known to the President and Directors, and expressly or tacitly acquiesced in, and approved by them; or if the said President, and a majority of the directors, were personally acquainted with such usage and course of business, purposely connived at the same, and declined investigation, then, the jury may infer, that the same were approved and permitted by the said President and Directors, though no formal communications of the same were made, by the said Cashier, to the Board of Directors, at their official meeting: and, upon finding such to be the fact, the jury, as to such balances, should find for the defendants, under the issues joined on the replications to the sixth, eighth, and ninth pleas.

Which instructions the Court altogether overruled, and refused to give to the jury.

3. If the jury find, from the evidence, that the several officers of the said bank, annually appointed by the said President and Directors, as aforesaid, each gave separate bond and security, for the faithful performance of the duties of his office;—that the said William Patton, so being Cashier, as aforesaid, died on or about the 28th of August, next ensuing his last appointment, on the 9th of March 1817; and that on the third day of September following, the said Philip H. Minor, having all along acted as teller, under his said appointment, as such, for one year, from March 1817, was duly appointed Cashier, in place of said Patton, and gave bond and security in the usual form, for the faithful performance of his duties as such Cashier; being at the same time under bond and security for the faithful performance of his duties as teller, for the year, ending in March 1818, as above stated; that he continued to be such Cashier, under his said appointment, till the 9th of March 1818, when he was again appointed Cashier for one year; and on the 19th of the same month, gave the bond now in suit;—that on the said third of September 1817, the said President and Directors, duly passed the said orders, of that date, appointing the said Philip H. Minor Cashier, as aforesaid, and directing the then officers of the bank, to do the whole duties of the bank; and did not then, or any time after the said ninth day of March 1817, make any new appointment of teller;—that the said Philip H. Minor, from the time of his first appointment as Cashier, usually per-

formed the duties of teller; which duties, as well as those of Cashier, were occasionally, and frequently, during the continuance of said Minor in the office of Cashier, performed by the other officers of the said bank, whilst the said Minor was absent, and otherwise occupied with the business and affairs of said bank;—that the separate office of teller was established at the first institution of said bank, by the written laws and ordinances of the President and Directors, as above given in evidence;—that after the said President and Directors ceased to appoint a distinct person as teller, as aforesaid, all the distinct functions and duties of teller, and the forms of keeping the accounts and transacting the business by the Cashier, or some other officer of said bank, in the name and capacity of teller, were pursued, the same as when the office of teller was filled by a distinct person; the practice being still continued, of placing the money of the bank, intended to answer the current demands of each day, in the hands of the officer as teller, of keeping separate accounts of such moneys, and of all deposits, and of all payments upon checks or otherwise, in the name and capacity of teller; such accounts being distinct and separate, and in distinct and separate books from those kept in the name and capacity of Cashier; and that the said Board of Directors, and the proper committees of the same, in their quarterly and other examinations and reports of the state and condition of said bank, and of the accounts of its officers, still kept up the distinction between the teller's and the Cashier's accounts, and the teller's and Cashier's money; then, that the defendants are not chargeable in this action for the conduct of said Philip H. Minor, in the execution of the duties distinctly appertaining to the office of teller, whilst he was Cashier, as aforesaid.

Which instruction the Court refused to give, the plaintiffs having offered in evidence to the jury, the following by-law of the said President and Directors, to wit:—

Article fifth, in section second of the by-laws, above given in evidence; and having also offered in evidence, to prove, that, after the appointment of the said Philip H. Minor to the office of Cashier, on the 9th of March 1818, he did, in fact, generally perform the duties of teller, with the knowledge of the President of the said bank; from which it was competent for the jury to infer, that he, the said Philip H. Minor, as Cashier, as aforesaid, was required by the President of the said bank, or by the Board of Directors of the said bank, to perform the duties appertaining to the office of teller.

Mr. Taylor, and Mr. Jones, for the plaintiffs in error.—

1. The Plaintiffs below sue in their corporate capacity, under the Act of Congress, of May 16, 1812, and no such corporation ever existed; it was to exist only, on the happening

of a future event. The law does not incorporate a company already formed, but provides for the erection of the corporation, upon certain conditions, and on certain forms being complied with.

The demurrer admits the facts stated in the first and second pleas, and the corrupt evasions of the Act prevented the corporation ever coming into existence. The obligors in the bond were not thereupon estopped, as the bond was given to supposed or fictitious persons, and not to an existing corporation; and there was no one in *esse* to take the bond. An estoppal cannot be alleged against an Act of Parliament. 1 *Chitty's Pleadings*, 435. *Comyn's Dig. Abatement*, 16. 3 *Instructor Clericalis*, 89. *Story's Pleadings*, 24.

Dealing with a pretended corporation, does not preclude a party from denying its existence; it must have existed *de jure*. It is no objection to the matter in the first and second pleas, that they are not pleaded in bar; a plea that goes to show that there never was such a person as the plaintiff, is a plea in bar. 1 *Bos. & Pull.* 44. 1 *Chitty*, 425.

The general rule that sealed instruments cannot be opened, has exceptions, and in cases of illegal and fraudulent considerations, and considerations *ex turpe causa;* a fraud which is injurious to the public, cannot be precluded by any shield of law. 2 *Wilson's Reports*, 347. 2 *Term Reports*, 171.

It is not necessary to resort to a *quo warranto*, to determine the existence of the corporation. The defendant in an action on a promissory note, may call upon a corporation, if plaintiff, to show its charter, and the same principle will apply in this case. A *quo warranto*, or *mandamus* would be proper, if the corporation had ever existed, but that was not the fact in this case; and it is not an answer to the course of proceedings, here, that it would multiply actions, for such would not be the fact.

2. As to the effect of the *nolle prosequi*. The action is upon a joint and several bond, and the obligors are sued jointly. The sureties appeared, and took a separate defence, and a verdict was obtained against them. The principal pleaded, after being ruled; and at the subsequent time a *nolle prosequi* was entered against him, and a judgment was taken against the sureties.

The proceeding was erroneous. Upon a joint and several bond, all the parties must be sued together, or each must be sued separately—and it is error to sue less than all, unless the suit be against one only. 3 *Term Reports*, 782. 1 *Hen. & Mumford*, 62. 3 *Mumford*, 187. 2 *Maul & Selwyn*, 23. 2 *Randolph*, 446. 478. 174. 313. 2 *Day*, 387. 5 *Mumford*, 536. 1 *Williams*

Saunders, 291. *vol.* 4. 207, *n.* 2—91. *note* 4. 1 *Henry Black.* 108. 1 *Bos. & Pull.* 670. 1 *Chitty*, 32, 33. 546.

If a judgment could not be obtained against four obligors, on a bond given by five, in a suit so instituted, it cannot be obtained by the entry of a *nolle prosequi* against one. 1 *Saunders*, 207. 1 *Chitty on Plead.*, 32. 38. 546. 5 *Espinasse's Nisi Prius Cases*, 47. Jeffray *vs.* Frebain—Chandler *vs.* Parks et al. 3 *Esp.* 76. The cases which impugn the doctrine contended for, are Noke *vs.* Ingraham, 1 *Wilson*, 89. 5 *Johnson's Reports*, 160.

If the parties to a joint and several bond are joined in an action, they never can be separated; and if one is discharged, all are discharged, except in cases of infancy and bankruptcy. 1 *Henry Black.*, 108. 1 *Bos. & Pull.* 630. The *rationale* of the rule is, that the party having made it a joint contract by his suit, cannot afterwards make it a several contract. 3 *Taunton*, 807. 4 *Taunton*, 468.

The most important inquiry in this case, is upon the instructions given by the Court.

Mr. Swann, and Mr. Wirt, Attorney General, for the defendants.

The instructions first given, sustain the action, and sweep away the defence, taking it entirely from the jury. The words "well and truly" in the condition of the bond, mean only integrity, not capacity. 10 *John.* 271—and the instruction given considers the words as requiring skill. The Cashier acted according to the instructions of the President and Directors, and to the usage of the Bank. The instruction given precludes mistake, and denies that it constitutes a defence.

The demurrers to the first and second pleas, were not on the ground of an admission of the facts, but the pleas were considered invalid. It was not obligatory on the Bank, that the capital should be 500,000 dollars, as the expression that it "may" consist of 500,000 dollars, authorizes it to be less, if it shall be deemed proper; and even admitting the collusion charged, as to the creation of a false capital, to the amount of 180,000 dollars, the remaining capital of 320,000 dollars was sufficient, under the charter. The pleas are also insufficient, as, although collusion is set up, there is no certainty in the charge or allegation of the persons concerned in it, or the place of the same. The whole purpose of the law is, to limit the amount of trading by the Bank; and it is not a fair construction of the Act of Incorporation, to interpret the terms "may consist" into "must consist." The company went into existence in 1812, and the Cashier was appointed in 1817, after many successive years of business by the Bank, which could not be affected by the proceedings of 1812.

2. The plaintiffs in error are estopped by having executed this

bond to the Bank, from denying the existence of the corporation. *Wills' Reports*, 11, 12. 14 *Johnson*, 238.

Where the matter which constitutes the ground of an alleged estoppal is new, it is necessary to state it by plea, but not so when it is contained in the declaration. 1 *Chitty's Pleadings*, 575.

The proper mode of contesting the existence of the corporation, would have been by an information, in the nature of a *quo warranto*; and it does not rest with every one dealing with a corporation, to inquire, when called upon to comply with his contract, whether it exists? It was not necessary to set out breaches, until the defendants, the obligors in the bond, had alleged performance, and then the pleas are insufficient; no breaches need be set out. 1 *Chitty*, 598. 1 *Saunders*, 103. *Archbold*, 262. 2 *Chitty*, 481. But if there are any omissions or defects in the pleadings, they are cured by the verdict, according to the laws of Virginia.

The instructions given by the Court upon the replication, and on the evidence, were such as the Court were bound to give, and were in strict conformity to the facts; and, if the Court refused to give the instructions asked for by the plaintiffs in error, they did so upon the authority of the by-laws of the bank, and the orders of the Board of Directors relative to the duties of the officers of the bank. Because the custom and practice might have been to overdraw the bank, and for its officers to abuse their trust, was this custom to excuse the conduct of the Cashier?

As to the effect of the *nolle prosequi*, all the cases referred to by the plaintiffs in error, are cases of joint contract, and where the trial was joint. But in this, the four sureties severed from the principal, and, on their own choice, went to trial alone, upon pleas put in separate from the principal.

The verdict has been given against the plaintiffs in error, on a trial of their own selection; and they suffered judgment to be entered against them, without any objection, before the principal in the bond had appeared and pleaded.

The entry of a *nolle prosequi*, does not admit that the plaintiff had no cause of action, it is not a *retraxit* or a release, and does not preclude the commencement of another suit. 1 *Williams Saunders*, 207. *Archbold's Practice*, 87. 1 *Saunders*, 291. 2 *Maul & Selwyn*, 444. 1 *Wilson's Reports*, 89. 5 *John.* 160.

Although the law is well stated to be, that a suit on a joint and several bond must be brought against all, or against one, and that you cannot sue four, when there are five joint obligors, yet the objection must be taken by plea in abatement; and if there is no such plea, and judgment, the consent of the defendants will be inferred. The following cases were also cited

in the argument,—Walsh *vs.* Bishop, *Cro. Char.* 239. *Ibid.* 243. *Carthew*, 98.

Mr. Justice STORY delivered the opinion of the Court.—

This is a writ of error to the Circuit Court of the district of Columbia, sitting at Alexandria. The plaintiffs in error were original defendants in the cause, and the suit is now before this Court, upon the judgment of the Court below, upon certain pleas of the defendants, to which there was a demurrer; and also, upon the instructions given and refused by the Court, upon the trial of certain issues of fact, joined by the parties.

The action is debt upon an official bond, given by Philip H. Minor, Cashier of the bank, and by four other persons, as his sureties, with condition, that Minor "shall well and truly execute the duties of Cashier" of the bank; and was originally brought against all the parties to the bond. The declaration proceeds for the penalty of the bond, without any notice of the condition, and avers, by way of breach, the non-payment of the penalty. The sureties, after oyer of the bond and condition, (which thereby became part of the declaration,) severed themselves from the principal, and pleaded nine several pleas. To the two first of these pleas, demurrers were put in; and the Court below, upon consideration, gave judgment upon the demurrers in favour of the bank; and the correctness of this decision, constitutes the first subject of inquiry.

Exceptions have been taken, both to the matter and the form of these pleas; and if the matter of them, or either of them, might constitute a good bar to the action, it may then be necessary to consider, whether that matter is pleaded with due propriety and certainty, according to the established rules of pleading, so as to escape objection upon general demurrer. Both of them are, in effect, though not in form, special pleas of *nul tiel* corporation. The first plea, in substance, avers, that, by the charter granted by the Act of Congress, of the 16th of May 1812, ch. 87, the capital stock of the bank was by the charter fixed and limited, to consist of 500,000 dollars, *bona fide*;—that the whole capital stock was not *bona fide* filled up, and subscribed for; but, on the contrary, by a collusion between the commissioners, under whose direction the subscriptions were taken, and the subscribers, a large portion of the capital stock, to wit, 18,000 shares, amounting to 180,000 dollars, were filled up, by false and colourable subscriptions; the ostensible subscribers, after payment of the first instalments, were fraudulently permitted to withdraw the same; and future payments by them, were dispensed with, while they were still rated and held out, as stockholders, for the purpose of colour-

bly filling up the subscription of the whole capital stock, and electing a Board of Directors; and that, in this manner, and by these means, and by no other, the bank was put into operation.

This plea is meant to rest upon two grounds, to sustain its legal propriety. First, that the subscription of the whole capital stock of 500,000 dollars, was a condition precedent to the putting of the bank into operation as a corporation. Secondly, that the collusion between the commissioners and the subscribers, for the 18,000 shares, being fraudulent, made their subscriptions a mere nullity.

Various answers have been given at the bar, to the legal sufficiency of the matters thus pleaded. In the first place, it is said, that the defendants are estopped, by the bond, to deny the legal existence of the corporation. In the next place, that the charter does not make the subscription of the whole capital stock, a condition precedent to the estsblishment of the bank. In the next place, that the question, whether the bank was regularly, and *bona fide*, put into operation, is matter not inquirable into, in a suit of this nature, but only upon a *quo warranto*, instituted by the government; and, in the last place, that the whole stock being, in fact, subscribed, the fraudulent intention and acts of the parties, did not make the subscription of the 18,000 shares a nullity. Let us, then, consider what is the true construction of the charter itself, upon the points raised at the argument, supposing it to have been, (which in terms it is not,) incorporated into the plea, and therefore judicially before us. The first section of the Act of the 16th of May 1812, chap. 87, provides, "that the subscribers to the Mechanics Bank of Alexandria, their successors and assigns, shall be, and hereby are created, and made a body politic, by the name and style of the Mechanics Bank of Alexandria; and by such name and style, shall be, and are hereby made able and capable in law, to have, purchase, &c., lands, &c. &c., and the same to sell, &c, to sue and be sued, &c. &c.; subject to the rules, regulations, restrictions, limitations, and provisions, hereinafter prescribed and declared."

In this section, there is no limitation as to the number of the subscribers necessary to constitute the corporation. The subscribers, whether many or few, are declared to be incorporated; and, unless there be some restriction or limitation elsewhere in the Act, is is most manifest, that the Court cannot intend that any particular amount of subscriptions is indispensable.

The second section provides, "that the capital stock of said corporation, *may* consist of 500,000 dollars, divided into shares of ten dollars each, and *shall* be paid in the following manner;

that is to say: one dollar on each share, at the time of subscribing, one dollar on each share at sixty days, and one dollar on each share, ninety days after the time of subscribing; *the remainder to be called for, as the President and Directors may deem proper;* provided they do not call for any payment in less than thirty days, nor for more than one dollar on each share, at any one time." The argument of the defendants is, that "may," in this section, means "must;" and reliance is placed upon a well known rule in the construction of public statutes, where, the word "may," is often construed as imperative. Without question, such a construction is proper, in all cases where the legislature mean to impose a positive and absolute duty, and not merely to give a discretionary power. But no general rule can be laid down upon this subject, further than that that exposition ought to be adopted in this, as in other cases, which carries into effect the true intent and object of the legislature in the enactment. The ordinary meaning of the language, must be presumed to be intended, unless it would manifestly defeat the object of the provisions. Now, we cannot say, that there is any leading object in this charter, which will be defeated by construing the word "may" in its common sense, as imparting a power to extend the capital stock to 500,000 dollars, and not an obligation, that it shall be that sum and none other. It is by no means clear, from this section, that the legislature contemplated that there should be a capital of 500,000 dollars, on which the bank was to commence, or carry on its operations. On the contrary, three instalments only are required to be absolutely paid in, and the residue of the capital stock is to be paid in, only when the President and Directors may deem it proper. So that the capital stock, except at the discretion of the Board, may never extend beyond the amount of 150,000 dollars, for any practical purposes, either as security to the public, or as the basis of discounts. Now, the plea itself does not attempt to deny that all but 18,000 shares of the stock were, *bona fide*, subscribed for; so that, for aught that appears, the capital stock, on which the bank carried on its operation, may have far exceeded that sum. It has been urged, that public policy requires such an imperative construction of the clause, for the public security. But it is a sufficient answer to that suggestion, that no such public policy is avowed, or can be inferred, from the general terms of the Act. When the legislature intends to restrict the capital stock of a bank, or to require any portion of stock or stockholders to be indispensable for its legal existence and operations, it is not uncommon to incorporate such a restriction into the charter. The omission to do so, is quite as sig-

nificant that the legislature did not deem such a restriction subservient to any manifest public policy.

The legislature might well presume, after prescribing the maximum to which the capital stock should extend, that the actual capital to be employed might safely be left to the discretion of the stockholders, or its agents. The 13th section of the charter contains provisions for the security of the public against over issues by the bank, and if any such restriction had been intended, as the argument supposes, it would naturally have found a place. It declares, that no stockholder shall be answerable for any losses, deficiencies or failure of the capital stock, for any larger sum than the amount of the stock belonging to him; excepting, that if the total amount of the debt of the bank shall exceed twice the amount of its capital stock, over and above deposits, then the directors shall, in their private capacities, be liable for the excess; and if the directors shall not have property to pay the amount of the excess, then every stockholder shall be liable for their deficiencies, in proportion to their shares in the bank. Whether, therefore, the capital stock be great or small, if there be debts due from the bank, exceeding twice the amount of the capital stock; which may fairly be construed to mean the capital stock actually paid in; the stockholders become ultimately liable for the excess; and this liability furnishes, if not an ample, at least a reasonable security against the public evils, which the argument supposes might result from not requiring the whole capital to be subscribed for. At all events, we cannot perceive any clear legislative intention to make the subscription of the whole capital stock, a condition precedent to the corporate existence of the bank, and unless it is so made by the charter, the matter of the plea falls, and cannot sustain the defence.

If, however, this interpretation of the charter could not be supported, and the subscription of the whole capital stock were a condition precedent, the result, so far as the first plea goes, would not be varied. The fraud and collusion asserted in that plea, if admitted in its fullest manner, does not lead to the conclusion which it seeks to establish. If the subscription were fraudulently made, with a view to evade the provisions of the charter, the law will hold the parties bound by their subscriptions, and compellable to comply with all the terms and responsibilities imposed upon them, in the same manner, as if they were *bona fide* subscribers. It will not make the subscription itself a nullity, but it will deprive the subscribers of the power of availing themselves of the same. The third section of the Act manifestly contemplates cases of fraudulent subscription, and provides, "that all the subscriptions and shares obtained in consequence thereof, shall be

deemed and held to be for the sole and exclusive use and benefit of the persons subscribing, or in whose behalf the subscriptions respectively shall be declared to be made, at the time of making the same; and all bargains, contracts, promises, agreements, and engagements, in any wise contravening this provision, shall be void; and the person, &c. subscribing, &c. shall have, enjoy, and receive the share or shares respectively, &c., and all the interest and emoluments thence arising, as freely, fully, and absolutely, as if they had severally and respectively paid the consideration therefor; any such bargain, &c. to the contrary notwithstanding."

This section seems to us conclusive upon the point. It avoids all bargains contravening the provisions in respect to subscriptions, and gives to the subscriptions the same effect as if they were *bona fide* made for the real use and benefit of the subscribers; and independently of this provision, it would be extremely difficult to maintain, upon general principles of law, that a private fraud, between the original subscribers and commissioners, could be permitted to be set up, to the injury of subsequent purchasers of the stock, who became *bona fide* holders, without any participation or notice of the fraud.

For these reasons, we are of opinion that the matter of the first plea, even if it had been well pleaded, would constitute no bar to the action.

The second plea is disposed of by the construction of the charter already intimated, and is further open to fatal objections, from its deficiency of proper averments, and want of legal certainty. It makes no averment of the amount of the capital stock, or of the necessity of the whole being subscribed for, before the bank is to be put in operation.

It asserts no fraudulent combination or subscription; but in the most general terms, without any certainty as to facts or circumstances, alleges, that the capital stock was not filled up by any subscription, opened and conducted in pursuance of the Act, so as to entitle the subscribers to bring the action; and that the subscribers did unjustly and unlawfully arrogate to themselves the corporate name, style, and privileges. without the capital stock having been filled up by subscription, or the corporation having been constituted and composed of actual subscribers, pursuant to the directions of the Act. In point of substance, as well as form, it is bad, upon the established rules of pleading.

This view of the case renders it wholly unnecessary to consider the point made as to the estoppal, and the necesssity of a *quo warranto;* on which, therefore, we give no opinion.

The third and fourth pleas are intended to be pleas of general performance; the third is so, in fact, and pursues the con-

dition of the bond. The fourth is argumentative, and assumes a particular legal interpretation of the condition, that is to say, that the condition covers only wilful defaults, and breaches of duty, and is no security for competent skill and reasonable diligence in the discharge of duty, but only for honesty. To these pleas special replications were filed, assigning special breaches of duty, upon which the parties were at issue, and upon this, and all the other issues in the cause, the jury returned a verdict for the plaintiffs. No exception has been taken to the sufficiency of these replications.

The fifth plea states a general performance of duty, in obedience to and in pursuance of the "directions, rules, orders, usages and customs of trade and business, ordained, established and practised in the said bank, by the authority of the said President and Directors." It is, therefore, argumentative, and supposes that compliance with the rules, orders, usages, &c., established and practised by the President and Directors, whatever they may be, whether within the scope of their power or not, would be a good and true discharge of duty. To this plea, a general replication was put in, "that the said cause of action, in the declaration mentioned, did accrue, as in the said declaration and breaches are set forth, without this, that the matters set forth in the said plea, are true," and this the plaintiffs pray may be inquired of by the country; and the defendants joined in the issue; upon which a verdict was found in favour of the plaintiffs. An exception has been taken at the argument to this replication, upon the ground that it ought to have assigned a special breach, and that the omission is not cured by the verdict. There is no question that the replication is not drawn with technical accuracy and correctness; and if the plea be a good plea of general performance, it is clear, both upon principle and authority, that a special breach ought to have been assigned in the replication; and the objection, if insisted upon by way of demurrer, for that cause, would have been insuperable. The reason is, that the law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. A covenant or condition for general performance, is broken by any single omission of duty, and no inconvenience can arise from stating the particular breach with suitable certainty. But it does not follow, that if not so stated, the objection may be taken in any stage of the suit. The rule as to certainty in pleadings, is framed for the benefit of the parties, and may be waived by them, and in many cases, both at common law, and by the statute of *jeo fales*, defects in this particular are cured by a verdict. It is true, that in

a declaration upon a covenant for general performance of duty, if no breach be assigned, or a breach which is bad, as not being in point of law within the scope of the covenant, the defect is fatal, even after verdict. *Com. Dig. Plead.*, p. 14. But that is not the present case. Here the declaration does assign a good breach, by the non-payment of the penal sum stated in the bond. The defendants disclose the condition of the bond upon oyer, and set up a general performance of it; and the replication, though inartificially drawn, puts in issue the whole matter of the defence, and denies the performance of it. The verdict has found that the condition was not performed, and consequently, upon the whole record, the non-payment of the penal sum is admitted, and the excuse for it is negatived. The replication, then, does assert a breach, though in too general a form. It ought to have assigned a special breach; but the general breach includes it, and the verdict having found the general breach, there is, upon principles, no reason shown against the plaintiff's right of recovery.

It is exactly like the case of a declaration upon a general covenant of the like nature, where a particular breach ought to be assigned; and yet if a general breach be assigned, the defect is cured, by a verdict for the plaintiff. *Com. Dig. Plead.*, 48. The objection, then, to the replication to the fifth plea, cannot now be sustained.

It is not necessary to notice the remaining pleas, upon which issues were joined, because a verdict has been found in all of them in favour of the plaintiffs, however liable to objection some of them may be, and particularly the seventh plea of *non damnificatus*, as an answer to the declaration. They set up special defences, and the plaintiffs were not bound to do more than traverse them.

The instructions of the Court, given and refused at the trial, constitutes the next subject of inquiry. It is conceded, that if the instructions given on the prayer of the plaintiffs were correct, as to the issues on the third and fourth pleas, the qualifications annexed to them by the Court in their applications to the other issues, were perfectly proper.

The first instruction is, in substance, that if Minor, upon his leaving the bank, failed to pay over or to account to the bank for any portion of the moneys of the bank, received by him as Cashier; then the jury may, and ought to infer that the moneys so unaccounted for, were wilfully wasted by Minor, or applied to his own use; and under such circumstances, the defendants are liable for the same. We can perceive no error in this instruction; the presumption of a wilful waste or misapplication of the funds of the bank by the Cashier, was a natural conclusion, from his failure to pay over

or account for the same. It was not put to the jury as a presumption capable of being rebutted by evidence showing a loss by negligence or accident. If such a loss actually occurred, it was incumbent on the Cashier to prove it, and his total omission to offer any such proof, which, from the nature of the case, must be more within his own power, than that of the Bank, ought to lead the jury to the presumption of the non-existence of any such negligence, or accidental loss.

It has been argued, that this instruction is the more material and injurious to the defendants, because it proceeds in the latter part, upon a misconstruction of the true import of the condition of the bond. The condition, that Minor shall "well and truly execute the duties of Cashier" of the bank, is said to be merely a stipulation for honesty, in the discharge of the duties, and not for skill, capacity, or diligence. We are of a different opinion. "Well and truly to execute the duties of the office," includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully—if they are violated, from want of capacity or want of care, they can never be said to be "well and truly executed." The operations of a bank, require diligence, with fitness and capacity, as well as honesty, in its Cashier; and the security for the faithful discharge of his duties, would be utterly illusory, if we were to narrow down its import, to a guarantee against personal fraud only.

The remarks already made, dispose of the second and third instructions prayed for by the plaintiffs. These instructions, in substance, declare that the sureties are liable upon the bond, for any wilful or permissive misapplication of the moneys of the bank, which the Cashier knowingly made, or suffered, without authority, whereby the same moneys have been lost to the bank. There seems no ground, upon which to rest any reasonable objection to such a direction to the jury.

We may now proceed to the consideration of the three instructions prayed for, in behalf of the defendants. The first is, in substance, that if it were the established usage and practice of the bank, that the Cashier might, in his discretion, permit customers to overdraw, and to have checks and notes charged up, without present funds in the bank; and for the Cashier to receive and pass, as cash, checks, and drafts upon other banks; and if the balances appearing against such persons charged in the books of the bank, arose out of the exercise of such discretion by the Cashier, in the course of the ordinary transactions of the bank, and pursuant to the established usage and course of business there adopted, and generally known to the President and Directors, practised and continued with their knowledge, for a series of years from the commencement of the bank, to the termination

of Minor's cashiership, though the existence of such balances, or the particular circumstances attending them, were not formally communicated to the Board of Directors; the jury may infer the approbation, assent, and acquiescence, of the President and Directors, as to such usage and course of business.

The refusal of this instruction, is matter of no small embarrassment and difficulty to this Court from the terms in which it is couched, and the issues on the sixth, eighth, and ninth pleas, to which, alone, it can be properly applied. Those issues put to the jury the question, whether the acts of the Cashier, whatever might be their character or kind, were, or were not, done by the *wrong, connivance and permission of the President and Directors of the Bank.* The point of the instruction is, that the established usage and practice of the bank for a long period, known to the President and Directors, does afford a presumption of the approbation, assent, and acquiescence of the President and Directors, as to such usage and practice; though the balances resulting therefrom, were not formally communicated to the Directors. From the shape of the prayer, it is undoubtedly meant that such usage and practice was known to the President and Directors, as a board, and in their official character, and received their approbation as such. In a general view, with reference to the principles of the law of evidence, we are not prepared to admit, that such a presumption could not ordinarily arise. The ordinary usage and practice of a bank, in the absence of counter proof, must be supposed to result from the regulations prescribed by the Board of Directors; to whom, the charter and by-laws, submit the general management of the bank, and the control and direction of its officers. It would be not only inconvenient, but perilous, for the customers, or any other persons dealing with the bank, to transact their business with the officers upon any other presumption. The officers of the bank are held out to the public as having authority to act, according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the bank in favour of third persons possessing no other knowledge. In the case of the Bank of the United States *vs.* Dandridge, (12 *Wheat.* 64,) the subject was under the consideration of this Court; and circumstances far less cogent than the present to found a presumption of the official acts of the board, were yet deemed sufficient to justify their being laid before the jury, to raise such a presumption. If, therefore, the usage and practice alluded to, in the instruction, were within the legitimate authority of the board, and such as its written vote might justify, there would be no question, in this Court, that it ought to have been given.

The pertinency of such a presumption, to these issues, cannot admit of dispute. But the real difficulty remains to be stated. Assuming that the Court, upon these issues, ought to have given the instruction prayed for, the question is whether upon the whole record, that is such an error as now justifies this Court in a reversal of the judgment. If the instruction had been given, and thereupon, a verdict upon these issues had been found for the defendants, could any judgment have been given upon these issues, in favour of the defendants; or ought the judgment, *non obstante veredicto*, to have been for the plaintiffs? If it ought, then the error becomes wholly immaterial; since, in no event, could the instruction, in point of law, have benefited the defendants. Upon deliberate consideration, we are of opinion, that the pleas, on which these issues are founded, are substantially bad. They set up a defence for the Cashier, that his omission "well and truly to perform" the duties of Cashier, was, by the wrong, connivance and permission of the Board of Directors. The question then comes to this, whether any act or vote of the Board of Directors, in violation of their own duties, and in fraud of the rights and interest of the stockholders of the bank, could amount to a justification of the Cashier, who was a *particeps criminis*.

We are of opinion, that it could not. However broad and general the powers of the direction may be, for the government and management of the concerns of the bank, by the general language of the charter and by-laws, those powers are not unlimited, but must receive a rational exposition. It cannot be pretended, that the board could, by a vote, authorize the Cashier to plunder the funds of the bank, or to cheat the stockholders of their interest therein. No vote could authorize the directors to divide among themselves, the capital stock, or justify the officers of the bank in an avowed embezzlement of its funds. The cases put are strong, but they demonstrate the principle only in a more forcible manner. Every act of fraud—every known departure from duty, by the board, in connivance with the Cashier, for the plain purpose of sacrificing the interest of the stockholders, though less reprehensible in morals, or less pernicious in its effects, than the cases supposed, would still be an excess of power, from its illegality—and, as such, void, as an authority to protect the Cashier, in his wrongful compliance. Now, the very form of these pleas, sets up the wrong and connivance of the board as a justification; and such wrong and connivance cannot, for a moment, be admitted as an excuse for the misapplication of the funds of the bank, by the Cashier.

The instruction prayed for, proceeds upon the same principles, as the pleas. It supposes, that the usage and practice of

the Cashier, under the sanction of the board, would justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw—and to have their checks and notes charged up, without present funds in the bank; stripped of all technical disguise—the usage and practice, thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank; and to connive at the withdrawal of the same, without any security, in favour of certain privileged persons. Such a usage and practice, is surely a manifest departure from the duty, both of the Directors and the Cashier, as cannot receive any countenance in a court of justice. It could not be supported by any vote of the directors, however formal; and, therefore, whenever done by the Cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is any thing but "well and truly executing his duties, as Cashier." This view of the matter, disposes of this embarrassing point, and also of the second instruction prayed for, by the defendants; which substantially turns upon the like considerations.

The third instruction prayed for, in effect, was, that the Court would instruct the jury, that the defendants are not chargeable in this action for the conduct of Minor in the duties distinctly appertaining to the office of teller, whilst he was Cashier in the bank, although those duties were duly assigned to him; because it constituted a distinct office, and the accounts and proceedings of the teller, were at all times kept distinct, and in separate books, from those of the Cashier. In our judgment, this instruction was properly refused. By the fifth article of the second section of the by-laws of the bank, the duties of the Cashier are generally pointed out; and among other things, it is provided, that he shall "do and perform all other duties, that may from time be required of him by the President or Board of Directors, relative to the affairs of the institution." On the appointment of Minor as Cashier, who had previously acted as teller, the directors passed a vote, "that the present officers of the bank, do the whole duties of the bank." From the other circumstances of the case, the inference is irresistible, that the duties of teller were, under this vote, assigned to the Cashier. If so, then the performance of these duties constituted thenceforth a part of the duties of the Cashier, as such; and as much so, as if they had been originally affixed to the office of Cashier. There is nothing in the nature of the duties of teller, incompatible with those of Cashier; on the contrary, as is well known, Cashiers often perform the functions of both. The circumstance, that the office of teller, and distinct accounts, and books, were still kept up, does

not vary the legal result. It was a matter of mere convenience and regularity, for the government of the bank, in its own business; and probably had no higher, or other origin, than to preserve the same forms and series of accounts, which the bank had adopted at its first institution. The office of teller had a nominal, but not a real, existence; and, from the time of the union of the duties in the Cashier, as such, there was a legal extinguishment of the separate official character. If the Cashier had originally had the duties of book-keeper and accountant assigned to him, and, in consequence thereof, had kept distinct account books in the bank, no one would have imagined, because he kept separate account books, as Cashier, for his own convenience, or, according to the ordinary usage of banks; that he would not, under his bond, have been responsible for mal-conduct, in keeping the general account books of the bank, to its loss or injury. The bond of the Cashier must be construed to cover all defaults in duty, which are annexed to the office from time to time, by those who are authorized to control the affairs of the bank; and sureties are presumed to enter into the contract, with reference to the rights and authorities of the President and Directors, under the charter and by-laws.

The remaining inquiry is, as to the effect of the *nolle prosequi*, which the plaintiffs entered against Minor, after he had pleaded, and after judgment was given against the sureties, in favour of the plaintiffs, upon all the pleadings interposed by the sureties. The pleas of Minor were, *mutatis mutandis*, the same as the third, fourth, fifth, seventh, and ninth pleas, put in by the sureties; and the question arises, whether under such circumstances, (no objection to the judgment appearing to have been made by the sureties,) this proceeding is an error, for which that judgment ought to be reversed. It is material to state, that the bond on which the suit is brought, is a joint and several bond. Under such circumstances, the plaintiff might have commenced suit against each of the obligors, severally, or a joint suit against them all. But in strictness of law, he has no right to commence a suit against any intermediate number. He must sue all or one. The objection, however, is not fatal to the merits, but is pleadable in abatement only; and if not so pleaded, it is waived by pleading to the merits. The reason is, that the obligation is still the deed of all the obligors who are sued, though not solely their deed; and therefore, there is no variance in point of law, between the deed declared on, and that proved. It is still the joint deed of the parties sued, although others have joined in it. This doctrine is laid down, and very clearly illustrated, in Mr. Serjeant Williams's note to the case of Cabell *vs.* Vaughan, (1 *Saund. R.*

291. *Note* 2,) where all the leading authorities are collected. If, therefore, the present suit had been brought against the four sureties only, and they had omitted to take the exception by a plea in abatement, the judgment in this case would have been unimpeachable. Is the legal predicament of the plaintiffs changed, by having sued all the parties, and subsequently, entered a *nolle prosequi*, against one of the obligors? If not in general, then, is there any legal difference, where the party in whose favour the *nolle prosequi* is entered, is not a surety, but a principal in the bond? not indeed, so named in the bond, but the suretyship resulting as a necessary inference from the nature and terms of the condition.

These questions must be decided by authority, if any such exist; if none can be found, then, they must be decided by analogy and principle. It may be proper, in this view, again to notice the fact, that this suit is on a joint and several bond; that the defendants severed in their pleas from the principal; that the trial of the issues, (which undoubtedly ought to have been, by the regular course of practice, deferred until the cause was at issue, as to all the parties, or the steps of the law taken to bring them into default;) does not appear upon the record to have been opposed, and that no motion was made in arrest of judgment, or for a postponement, until a trial of the issues upon the pleas of the principal might have been had. What would have been the proper proceedings under such circumstances, whether to try all the issues by the same jury, and have damages assessed at the same time against all the defendants; or whether there might have been several trials, and several assessments of damages; and whether, if such several assessments had been made, and differed in amount, any, and what judgment, ought to have been entered; are points upon which the Court does not think it necessary to give any opinion.

The nature and effect of a *nolle prosequi*, was not well defined, or understood, in early times; and the older authorities involve contradictory conclusions. In some cases it was considered in the nature of a *retraxit*, operating as a full release and discharge of the action, and, of course, as a bar to any future suit. In other cases it was held not to amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. And this latter doctrine has been constantly adhered to, in modern times, and constitutes the received law. In cases of *tort* against several defendants, though they *all join* in the same plea, and are found jointly guilty, yet the plaintiff may, after verdict, enter a *nolle prosequi*, as to some of them, and take judgment against the rest. The reason is said to be, that the

action is in its nature *joint* and *several*; and, as the plaintiff might originally have commenced his suit against one only, and proceeded to judgment and execution against him alone, so he might, after verdict against several, elect to take his damages against either of them. *A fortiori*, the same doctrine applies where the defendants sever in their pleas. Indeed, in *tort*, as we shall hereafter see, it does not seem to have been denied, that cases might exist, in which, if the defendants severed in their pleas, the plaintiff might, *after* judgment against *one*, have entered a *nolle prosequi* as to the others. The doubt was, whether he could do so *before* judgment, which was finally settled in favour of the right, and in such cases, where several damages were assessed against the different defendants, the difficulty was afterwards cured, by entering a *nolle prosequi* as to all but one defendant. And in the same manner, a misjoinder of improper parties is sometimes aided. The authorities on this subject, will be found summed up with great accuracy, in a note of Mr. Serjeant Williams, to the case of Salmons *vs.* Smith, (1 *Saund. R.* 207, *note* 2.) In the same note, the learned editor adds, "if an action is brought upon any contract against several defendants, *who join in their pleas*, and a verdict is found against them, it is apprehended the plaintiff cannot enter a *nolle prosequi* against any of them; because the contract being joint, the plaintiff is compellable to bring his action against all the parties thereto; and he shall not, by entering a *nolle prosequi*, prevent the defendants against whom the recovery has been had, from calling upon the other defendants for a rateable contribution."

So far as this reason goes, it is inapplicable to the present case; for, the defendants are entitled not only to a rateable, but a full, contribution over, for the entire sum, against the party in whose favour the *nolle prosequi* has been entered; and consequently, the *nolle prosequi* does not touch their rights. It is observable also, that the language is qualified by the words "*who join in their pleas;*" which are printed in italics, and may therefore fairly be presumed to have been inserted by the learned editor, *ex industria*, with a view to point out an implied distinction between cases, where there is a severance, and where there is a joinder in the pleas. If there be any such distinction, it is favourable to the present case; for, the plaintiffs severed in their pleas from their principal. The learned editor proceeds to state, that, "if in such actions the defendants *sever in their pleas*, as where one pleads some plea which goes to his personal discharge, such as bankruptcy, *ne unques executor*, and the like, *not to the action of the writ*, the plaintiff may enter a *nolle prosequi*, as to him, and proceed against the others; for, with respect to the bankruptcy, the statute of 10th Ann, chap. 5, makes the

other defendant, who is not a bankrupt, liable for the *whole* debt; and therefore, in that particular instance the case is exactly the same, as where an action is joint and several. So the plea of *ne unques executor*, does not deny the cause of action; but only, that he is one of the representatives of the testator. When the *defendants sever in their pleas*, with this limitation as to the extent of the pleas in action upon contracts, it is immaterial, what is the form of the action; for, the plaintiff may enter a *nolle prosequi* against any of them, before verdict, and proceed against the rest."

The learned editor is fully borne out, in the general position here stated, by the case of Noke et al. *vs.* Ingraham, (*Wilson R.* 89,) to which he refers. The only question is, whether there is any such qualification upon it, as that the plea should be one going exclusively in personal discharge, and not to the merits? That is the point of real difficulty. The case in 1 *Wilson R.* 89, was upon several promises made by the defendants, as partners. One of them pleaded a former judgment; and issue being taken upon the replication of *nul teil* record, judgment was given against him, and a writ of inquiry of damages awarded, and final judgment. The other defendant pleaded his bankruptcy, and upon this, issue was joined; and afterwards the plaintiff entered a *nolle prosequi*, as to him. Upon error brought, the principal objection was, that the *nolle prosequi*, upon a joint contract of two, was a discharge of both. Mr. Chief Justice Lee said, "it is agreed, on all hands, that in trespass against several, the plaintiff may enter a *nolle prosequi*, as to one, and that will not discharge the other; and therefore, I cannot see, why it may not be done in this case; and I do not see, how so proper an advantage can be taken upon the statute of Ann, as to the bankrupt, as is now taken by the entry of this *nolle prosequi*." Wright, Justice, was of the same opinion, and so was Dennison, Justice; and the latter added, that "the plea of the bankrupt is not a plea to the action, but only a personal discharge; but that if one defendant was to plead a plea that was to go to the action of the writ, he thought it might then have a different consideration, but that this is not the case here. This case is exactly the same, *as when an action is joint and several;* for, the statute 10th Ann, ch. 15, has made the partner not a bankrupt, liable for the whole debt. This case is the very same, as to this matter of entering a *nolle prosequi*, as if it had been trespass against several defendants."

It is apparent, from this summary of the reasoning of the Court, that the case turned upon the consideration, that the contract, by the operation of the statute of Ann, was several as well as joint; and all the Court concurred, that, under such circumstances, the *nolle prosequi* would be good, being govern-

ed, in the analogy, to trespass, where the cause of action was several as well as joint. What was stated by Dennison, Justice, was not the exclusive ground of his particular opinion, but only a suggestion, that the case *might* be, (not would be,) different upon a plea to the merits. Now, the general reasoning comes very close to the case at bar; for here the bond is *several*, as well as *joint*, and an action might have been maintained severally against the defendants; and what is not immaterial to be considered, all the parties were retained, who had joined in their pleas, and between whom there existed a right of mutual contribution. Even in the case of bankruptcy, the practice is, in England, to require all the joint contractors to be sued, as is proved by the case of Bevil *vs.* Wood, (2 *Maul & Selw.* 23,) which makes it really less strong than a joint and several contract.

The case of Moravia, and another, *vs.* Hunter & Glass, (2 *Maul & Selw.* 444,) which has been relied on, at the bar, was *assumpsit* against four defendants, two of whom were not served; D., one of the other defendants, pleaded—1. *Non assumpsit.* 2. A special plea of bankruptcy. 3. A general plea of bankruptcy, as to whom the plaintiff entered a *nolle prosequi.* The other defendant pleaded *non assumpsit*, and a verdict was found against him. The form of the *nolle prosequi* was, that the plaintiffs, inasmuch as they "cannot deny the *several matters above pleaded, by the said D.*, freely here in Court confess, that they will not further prosecute their suit against him." It was moved, in arrest of judgment, that the *nolle prosequi*, so entered, had confessed the *non assumpsit*, as well as the other pleas; and therefore, the other defendant was also discharged, and the distinction of Dennison, Jus., in Noke *vs.* Ingraham (1 *Wils. R.* 89,) was relied on. But the Court held, that the *nolle prosequi* was, in effect, only a confession; that as far as regards D., he had a defence in the matters pleaded by him. This case does not, in terms, overrule the distinction, but it does establish, that the Court upheld the *nolle prosequi*, notwithstanding the pleadings did set up a plea to the merits, and not merely a personal discharge. The contract does not appear to have been joint and several; and to have arrived at its conclusion, the Court must have considered, that the confession of the plaintiffs, that they could not deny the *several matters* above pleaded, ought not to be deemed an admission of the truth of the pleas, except so far as to waive further proceedings in the suit, against the party who sets them up as a defence. This conforms to the definition given in the book, of a *nolle prosequi*. "It is," as Serjeant Williams states, (1 *Saund. R.* 207, *note* 2,) "a partial forbearance by the plaintiff to proceed

any further, as to some of the defendants, or to part of the suit, but still he is at liberty to go on as to the rest."

These are the only cases in England, which the researches of counsel have brought to our notice, bearing directly on the point before the Court; and upon looking into the elementary treatises and books of practice, we have not been able to find any more general doctrine. Indeed, the latter confine themselves exclusively to the enunciation of the principles above stated, with the qualifications annexed to them in these authorities, as, see 1 *Chitty's Plead.*, 32, 33. 546. *Com. Dig. Pleader*, *X* 2. 3. 5. 2 *Tidd's Practice*, 630. 2 *Arch. Practice*, 219, 220. 2 *Lilly's Practical Register*, 280. In America, the cases have gone a step further. In Hartness *vs.* Thompson, (5 *John. R.* 160,) where an action was brought against three, upon a joint and several promissory note, and there was a joint plea of *non assumpsit*, and the infancy of the defendants, that was set up at the trial; it was held no ground for a nonsuit; but the plaintiff upon a verdict found in his favour against the other two defendants, might enter a *nolle prosequi*, as to the infant, and take judgment upon the verdict against the others. In Woodward *vs.* Marshall, (1 *Pickering's Reports*, 500,) in the Supreme Court of Massachusetts, upon a joint contract and suit against two persons, one of whom pleaded infancy, it was held that a *nolle prosequi* might be entered, as to the infant, and the suit prosecuted against the other defendant. These decisions were admitted to be against the cases of Chandler *vs.* Parker, (3 *Esp. Rep.* 76,) and Jaffray *vs.* Frebain, (5 *Esp. Rep.* 47,) but the Court thought the practice adopted by themselves was most convenient, and therefore gave it a judicial sanction. These cases were distinguishable from that in 1 *Wilson's R.* 89, in the fact, that the plea went, not only in personal discharge, but proceeded upon a matter which established an original defect in the joint contract; whereas the plea of bankruptcy was for matter arising afterwards. The distinction was not thought to be sound. Indeed, the Court seem to have considered the question rather as a matter of practice, to be decided upon convenience and policy, than as matter of principle.

Hitherto the question has been discussed, as if the *nolle prosequi* had been entered *before*, when in fact it was entered *after* judgment against the defendants. The next inquiry is, whether this creates any substantial difference in the case. In Lever *vs.* Salkeld, (2 *Salk.* 455,) in trespass against two defendants, and verdict for the plaintiff, one being an infant, the plaintiff took judgment against the other, and entered a *non pros.* after the judgment against the infants, and took out execution upon the judgment; upon error brought, it was objected that

a *non pros.* could not be entered after judgment, for the judgment could not vary from the demand of the writ. It was argued on the other side, that *torts* were several, and that a *non pros.* might be entered after, as well as before judgment, and cases to this effect were cited. Lord Holt is reported to have said, that he supposed there were interlocutory judgments, wherein it might well be; but a final judgment differed, for that being once wrong, a subsequent entry would not set it right. The case was however adjourned, and nothing more appears of it. This case is not very accurately reported, and it may have been that the judgment was joint, and the *nolle prosequi* afterwards, which would remove the objection to its authority. The circumstance of its being adjourned, shows that the doctrine thrown out by Lord Holt, was not deliberately considered by him, and was deemed not clear. In truth, it is directly against the case of Parker *vs.* Lawrence, decided in the Exchequer chamber, and reported in *Hobart's Rep.* 70. That was trespass against three; one pleaded not guilty, and the other two a justification, to which the plaintiff replied, and there was a demurrer to the replication. Pending the demurrer, the issue was tried, and damages and judgment given against him. After judgment, the plaintiff entered a *nolle prosequi* against the other two, and a writ of error was afterwards brought by all three; and it was alleged for error, that the *nolle prosequi* discharged all three. It was agreed by the Court, (in conformity with the doctrine then prevailing,) that if the *nolle prosequi* had been before judgment, it would have discharged the whole action; and so it would, if the judgment had been against them all, and then the plaintiff had entered a *nolle prosequi* against the other two; for a nonsuit, or release, or other discharge of one, discharges the rest. But here the action was at an end, as to the one, by the judgment against him, and no judgment was had against the others, so that they were divided from him, and are not subject to the damages found against him. It was adjudged that he was not discharged, and there was no error. This case is of great authority, having been deliberately decided by a very high Court. It is cited as authority, by Chief Baron Comyns, in his digest, (*Pleader, X.* 5,) who also cites (*Pleader, X.* 3,) the case in Salkeld, as one in which there was a final judgment against all the defendants. The reason of the thing would seem entirely in favour of the judgment in *Hobart*, and it stands supported by a much earlier case, in the year Books, (14 *Edw.* 4; *Brooks abridg. Trespass, pl.* 331.) If the plaintiff may, in any case, recover a judgment against one on a joint action against two, who sever in their pleadings, it is wholly immaterial to the regularity and effect of that judgment, in what stage of the cause the suit has ceased to be pro-

secuted against the other. It is sufficient, that in the event the judgment is consistent with the general principles of the action. If a *nolle prosequi* may be entered after verdict, and before judgment, without discharging the other party, there is no good reason why it may not be done after judgment, when there has been no proceeding which binds the plaintiff to consummate a judgment against the party whom he wishes to dismiss. In each case the judgment upon the whole record is consistent with the writ.

The result of this examination into authorities, is, that there is no decision exactly in point, to the present case; that there is no distincion between entry of a *nolle prosequi* before, and the entry after judgment, applicable to the present facts. That the authorities, and particularly the American, proceed upon the ground that the question is matter of practice, to be decided upon considerations of policy and convenience, rather than matter of absolute principle; and that therefore this Court is left at full liberty to entertain such a decision as its own notions of general convenience, and legal analogies would lead it to adopt. We are of opinion, that where the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed. It is a practice which violates no rules of pleading, and will generally subserve the public convenience. In the administration of justice, matter of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice.

Mr. Justice JOHNSON, dissenting.

The facts appearing upon the records, from the count, pleas, and replications, are these. This action was on a bond given for the faithful discharge of the office of the Cashier, by Philip H. Minor. It was joint and several. The defendants craved over jointly, and pleaded performance, to which plaintiff replied.

They afterwards had leave to withdraw the joint pleas; and the four securities jointly filed various pleas, to which plaintiff replied; and issue being taken, proceeded to trial, and obtained this verdict.

After the verdict, the principal to the bond was ruled to plead, and he then files a variety of pleas, similar in effect, to those pleaded by the securities. The Court then gave judgment upon the verdict, and the plaintiff's attorney enters this *nolle prosequi*; and judgment is given for the principal, on the bond. That the plaintiffs take nothing *by their bill*, but for their false clamour, be in mercy, and that the defendant go thereof, without day, and receive his costs.

It was insisted by the defendants, that, in this state of the pleadings and record, the plaintiffs ought not to have had

judgment below—that there is error, and the judgment should be reversed. What further order this Court would be bound to render upon a reversal, it is not material to inquire. I readily assent to the doctrine, that, in adjudicating upon questions of practice, a Court should have regard to public convenience; but it would be extending this principle to the violation of its own spirit and intent, if carried to the extent of overturning known established rules, both of law and practice.

To this extent, it appears to me, the present decision goes; and that this judgment cannot be affirmed, without shaking as well established principles, as adjudged cases; and opening a door to inconveniences, which must soon compel this Court to retrace its steps.

The judgment, as it stands below, is against four out of five joint and several co-obligors; and the obligor omitted, or rather who has judgment in his favour, is the Cashier, for whose good conduct in office, the other three became bound. Now, this judgment is either a bar to a future suit against the principal, or it is not. If a bar, then the record exhibits the inconsistent case of four being made liable for one, who was not liable himself. And if it is not a bar, then, by possibility, it may be established by the verdict of a future jury, that the co-obligor, for whose misfeasance, alone, these defendants have had judgment against them, had, in fact, committed no misfeasance. A rule of practice, that may lead to such consequences, cannot rest upon public convenience.

Nor is it more easy to reconcile it to principle. No authority need be cited, to establish, that wherever judgment ought to have been arrested below, this Court is bound to reverse for error. Now this judgment is against one of the canons of the law of contracts. It was at the option of the plaintiff, whether to treat the bond as a joint or several contract. He has elected to treat it as joint; and must, therefore, abide by the law of joint contracts, as to both right and remedy; and, upon these, when under seal, it is an invariable rule, that all must be sued, if all have sealed the instrument, and are in life.

It is true, that, in general, the non-joinder of co-obligors must be pleaded in abatement; but it would be oppressive and inconsistent to apply this rule to a case, in which it was impossible to plead in abatement, and that was precisely this case; since the discharge of the principal from the action, was produced by the act of the plaintiff, *after judgment*, at a time when it was impossible, by any form of pleadings, for the defendants to avail themselves of this right. But this case comes within an exception to the general rule on the subject of pleas in abatement; since, by the plaintiff's own showing, in his declaration

and replication, all the co-obligors named in the instrument, sealed it, and were in life at the commencement and close of the suit.

This distinction, if it be necessary to cite authority for it, clearly appears from comparing the case of Rice *vs.* Shultz, 5 *Bur. Reports*, 2611, with the case of Hermer and Moore, noticed in the report of that case. In the one, it was necessary to plead in abatement, because the facts did not appear on record, which were necessary to maintain the defence. In the other, the judgment was arrested, because the facts of the plaintiff's own showing, made out that he ought not to have judgment, which were, all had sealed the instrument—and all were alive. It cannot be questioned, that in a joint contract by five, where all remain equally bound—all in life, and all within reach of the process; more especially, where they have been all actually arrested, the plaintiff must recover against all, or none. This is that case; and yet the plaintiff is allowed here to take judgment against four, and discharge the fifth, the principal, by *nolle prosequi*, after judgment.

It cannot be doubted, that had this *nolle prosequi* been entered before trial, the defendants must have been permitted to plead it, *puis darien continuance*, and that the plea must have been sustained. And what reason is there, for placing them in a worse situation, by suffering the *nolle prosequi* to be entered after judgment? It is said they severed in pleading, and suffered the cause to go to trial, without objection. But was it in the power of these defendants, to compel their co-obligors to join them in pleading? or if the plaintiff choose to proceed erroneously to trial, were the defendants under any obligation to arrest him, and set him right? It was his own folly, if he ruled them to trial, or consented to go to trial, or committed any other error, in proceeding to judgment. I have stated it to be not indispensable, in my view of the subject, that the *nolle prosequi* should be a bar in this case to a new suit against the principal. The derangement of the rights and liabilities of the parties, produced by it, appears a sufficient objection both to the principle and practice. For, certainly, it goes to enable a plaintiff to recover, by this device, against parties, who otherwise could have defeated his action by suitably pleading. By a novel practice, as it relates to joint contracts, he is here permitted to evade an important legal principle. But, if this *nolle prosequi* can be shown to be a bar to his action against the principal co-obligor, it would seem to be incontestible, that this judgment ought to be reversed. And I am yet to learn, that, in a joint action *in contract* against several, a *nolle prosequi* as to the whole action, against one, is not a bar as to him.

The cases are very few in the Books, in which the effects of a *nolle prosequi*, in such a case, has been tried by the only sufficient test—a plea in bar, to a suit upon the same contract. But as far as they have gone, they maintain the bar.

If a bar, in cases in which the suit is against a single defendant, there can be no reason assigned why it should not be a bar as against one of the several defendants. And to this point, Beecher's case, reported in 8 *Coke*, 58. *Croke James*, 211, is direct and positive.

That was a suit upon a bond, and the judgment there is nearly in the words of the judgment in this case. On a second action, upon the same contract, this was held to be a bar; and it became necessary to remove the judgments, by a writ of error, for some technical informalities, before this obligee could recover in the original contract.

It is true, that Serjeant Williams has said, in his note to 1 *Saunders*, (207 *a.*) "that a *nolle prosequi* is now held to be no bar to a future action, for the same cause, except in those cases where, from the nature of the action, judgment and execution against one, is a satisfaction of all the damages sustained by the plaintiff."

And by reference to the next page of his note, it appears, that the *exception* here introduced, is intended to embrace actions for *torts;* and therefore his *rule* is intended to apply to actions on contracts.

But the authorities he cites, are far from bearing him out in his doctrine. The case of Cooper *vs.* Tiffin, (3 *T. R.*, 511,) upon which he relies, decides nothing but a question of costs; and the position, that a *nolle prosequi* is no more than a discontinuance, and the party may sue again, is only an *obiter dictum*, in case where the point was not presented.

So, also, of his other case, in 1 *Will.* 89. The facts did not raise the question on the effect of the *nolle prosequi*, as to the defendant who was discharged by it; and the Judges, in considering whether the plaintiff could have judgment against some of the joint contractors, where the other was discharged by bankruptcy, expressly decide upon the ground, that he being discharged by law, leaving the other bound for the debt, produced an analogy between that case and the case of a suit in trespass, where one only might be sued separately. But it is said, and so Serjeant Williams asserts, "that the true nature and extent of a *nolle prosequi*, in civil cases, was not accurately defined and ascertained, until modern times."

My own opinion is, from all the investigation I have been able to make, that it was much better understood, in former times, than it is at this day. That if it were now better understood, we should perceive fewer of those inconsistencies which

are supposed to exist in the decisions on this subject. Thus Serjeant Williams has mixed up the cases on *torts*, with those on contracts, in such a manner as could only produce confusion. To sustain the doctrine that a *nolle prosequi*, in an action of debt, is a bar to another suit on the same bond, he quotes Green *vs.* Charnock, (*Croke Eliz.*, 762,) which was trespass *quare clausam fregit*. And for other cases which he says establishes the principle "that a *nolle prosequi* is not of the nature of a *retraxit*, or a release; but an agreement only, not to proceed as to some of the defendants, on a part of the suit." Without restricting the doctrine to any class of cases, he cites a string of authorities, in every one of which the decisions were in actions of trespass, or *tort*.

Yet it cannot be contended that the use of the *nolle prosequi* in cases of *tort*, in which the defendants may be joined and disjoined at the pleasure of the plaintiff, can afford precedent or authority for the use of it, in cases of joint contract; in which the law, regarding the nature of the contract, and the rights of the parties, imposes on the plaintiff the obligation to sue them jointly.

To me it appears that there is abundant authority to prove that the *nolle prosequi*, though entered by attorney, with the judgment that defendant "*eat sine die*," has the effect of a *retraxit*. Lord Coke certainly places them on the same *foot*, both in his Institutes, (1 *Inst.* 139,) and his comment upon Beecher's case (8 *Rep.*,) and in both instances he describes the *nolle prosequi* as one of two kinds of *retraxit*, appropriate to different cases, but both producing a bar. And yet in one only is the term *retraxit* introduced into the entry of judgment. (*See* also 2 *Rolls Abridg. nolle prosequi.*)

In Green *vs.* Charnock, (*Cro. Eliz.* 762,) they are certainly treated as synonymous and equivalent. That was trespass, *quare clausam fregit*, against C. & S. S. made default and judgment of *nil dicit* was then taken against him. C. pleaded in bar, plaintiff replied, &c. and judgment in demurrers for plaintiff. A *nolle prosequi* was then entered against S. and writ of inquiry and judgment against C. And the case proceeds; "thereupon they brought error, and the error assigned, was because this *nolle prosequi* is against one, when judgment is taken against both; being that a *retraxit* against one is as strong as a release against the one, the which being to one defendant, is a good discharge to both." So again, in the case of Dennis *vs.* Payne, *Cro., ch.* 551, P. & P. gave their joint and several bond to D. who sued the one severally, and after plea, entered a *retraxit*. He afterwards brought suit upon the bond, against the other, P. who plead the *retraxit* to the first in bar. There was no question made upon its being a bar, either direct

or by estoppal; as to the obligor first sued, it is, in terms, admitted. But the benefit of that discharge was claimed by the second P. and on this the judges divided, one maintaining that its effect was that of a release, and the other, that of an estoppal, only to be taken advantage of by him, in whose favour it was entered; and Croke, who held it to be an estoppal, identifies it with a *nolle prosequi*, by observing that it is "*quasi* an agreement that he will no further prosecute; "*non vult, ulterius prosequi.*" So that both admit it to be a bar against the one discharged. So in *Hobart*, 70, and in 3 *Kebble*, 332, p. 31, in the year 1674; *nolle prosequi* and *retraxit* are considered as synonymous. So in *Silley's Practical Register*, in 1719, a *nolle prosequi* is defined thus: "this is, that the plaintiff will proceed no further in his action, and may be as well before as after verdict; and is stronger against the plaintiff than a nonsuit, for a nonsuit is a default for non-appearance, but this is a voluntary acknowledgment *that he hath no cause of action.*" *(Title Nolle Pros.)*

So Serjeant Salkeld, who comes down to the time of Queen Ann, refers to Beecher's case for the law of *retraxit*, and gives the definition of *retraxit* in the words of the entry of a *nolle prosequi*, *(Title Retraxit, 3 Salk.)* So in 4 *Wood*, 87, in the year 1691, it is distinctly asserted, that an entry "of a *venit hic in curia, et fatitur hic in curia*, with a judgment that defendant *eat unde sine die*" is equivalent to a *retraxit*. At what period a different idea begun to prevail, I have not been able to discover; certainly I can find no adjudged case to support it.

In the case of Walsh *vs.* Bishop, in *Cro. Char.* 239. 243, referred to by Serjeant Williams, as introducing a different doctrine, is directly against him. That was an action of trespass and battery against two; they severed in pleading, and after verdict against both, a *nolle prosequi* was entered against one, and the other moved it in arrest of judgment. In that case, it is admitted, in terms, by the Court, that as to the one, the *nolle prosequi* was an absolute bar. And by reference to the same case, in page 239, it will be seen, that the argument rested upon the right of a plaintiff to proceed against one of several defendants in *trespass*.

If this plaintiff ever had a right to proceed against these four defendants, in originating this suit, I should have felt no doubt. That is the case in trespass, that is the case where one defendant is bankrupt, or an infant, or pleads *ne unques executor*. 1 *Will.* 89. 3 *Espin. R.* 76. There is a modern book of practice of great respectability, (I mean Sellon, title, *Nolle Prosequi*,) in which this doctrine is summed up to my entire satisfaction. The form of the entry is there given in words, and conforms entirely to the entry in this case, except that the words are here added, that "the plaintiffs take nothing by their

bill; but for their 'false clamours be in mercy;'" which can at least detract nothing from the effects of the judgment. Yet it is there laid down, as the law of his day, that such a judgment, when it goes to the whole cause of action, operates in effect, as a *retraxit*. The judgment in this case goes to the whole cause of action, and as between the plaintiff and the Cashier, is of the same effect, as if there had been no other defendant to the action. In a subsequent part of the article, the same author, (Sellon,) recognises the distinction between cases of trespass, or *tort*, and cases of contract; and lays down the rights of the parties in each, in accordance with the views I entertain on the subject, to wit: that if the *nolle prosequi* be entered, so as to produce any derangement in the rights of the defendant, to deprive them of a legal defence, or subject them to increased difficulties or liabilities, it is error.

The case in *Maul & Selwyn*, which was supposed to have overruled the previous decisions, is in perfect accordance with them; for, although the defendant had pleaded *non assumpsit*, he had also pleaded his discharge as a bankrupt. On the contrary, if the language of the Court in that case be considered as affording the true *rationale* of the entry of the *nolle prosequi*, it would be fatal to the plaintiffs in this cause. The Court say, it amounts to an acknowledgment that the one defendant had a defence. But what defence did this co-obligor set up that the other defendants ought to have the benefit of? His pleas, were, in terms, those which had been pleaded by these co-obligors. If this confession of plaintiffs went to those pleas, then were these defendants discharged, since they could not be liable if he was not guilty.

It is a question of no importance—one of no influence upon the law of the case, whether a *nolle prosequi* may be entered before, or after judgment, or when it may be entered; otherwise than as it affects the legal relations of the parties, and the rules which govern suits at law.

And here, I think, I may very confidently maintain, that in no case can a *nolle prosequi* be legally entered, as to one of the defendants, unless the suit might originally have been maintained against those who remain; or, unless the remaining defendants might have availed themselves of pleading the non-joinder of their co-obligor, if their rights were affected by his exclusion from the action.

In the first class are comprised all actions of *tort*, in which no prejudice is done to the defendants, since their co-defendant need not originally have been made a party. And I may add also, the case of bankrupts and infants, both of whom, when joint contractors, may be admitted as defendants, upon declaring against their co-obligors, according to the truth of the

case. They may, also, without prejudice to their co-defendants, be discharged by *nolle prosequi*; but even as to them, it seems the precedents imposed a restriction; for, it is not permitted, if they have blended their fate with that of their co-defendants, by joining in their pleas. They have then waived their privilege. If their pleas impart no waiver of their privilege, the right of the plaintiff to his *nolle prosequi*, as to them, is conceded; because the relations of the parties are not altered, nor their rights in any way prejudiced. But I conceive the *nolle prosequi* cannot be entered at any point of time, when it would place the defendants in a worse situation, or deprive them of any advantage of making their defence.

Surely the precedents for entering the *nolle prosequi* after judgment in actions of *trespass*, against some defendants, and going on to levy satisfaction from the rest, can afford no precedent here; since it is, in the one case, what the law enjoins; in the other, what it forbids.

Nor are the precedents of cases in which the one defendant never was bound, or is discharged by operation of law, without discharging the other, any better authority. In all these cases, the relative rights and liabilities of the parties remain the same. No legal absurdities can ensue, and no more is given against them, by the judgment, than what could have been legally claimed of them by the action.

There is one curious result produced by this decision, which is not among the least of the objections to rendering a judgment for the defendant in error. It cannot be contested, and the whole argument is admitted, that if the discharge of the principal produce a bar in his favour, this judgment should be reversed for error. But the conclusion, that it is no bar, is now to be deduced from a string of decisions, in every one of which, Serjeant Williams himself admits, that no recovery could be had against the defendant who has been discharged by the *nolle prosequi*. It is true, he attributes this bar to the nature of the action; but this is at least acknowledging that the material question, in the trespass cases, never could arise in the present case. In the only case, however, even in trespass, in which the question in this case came distinctly before the Court, I mean the case of Green *vs.* Charnock, (1 *Croke*, 762;) in which there was an interlocutory judgment against S., and judgment pronounced against C., and a *nolle prosequi* as to S.; it was adjudged, that the *nolle prosequi* as to S. was a release to him, and therefore to C.; and the judgment against C., was reversed in error brought, and yet there they did not join in pleading. If, in the present case, the defendants had all pleaded, whether jointly or severally, and verdict had been for the one defendant, on any plea to the merits, it is clear, that, not-

withstanding a verdict had passed for the plaintiff against the remaining four, he could not have had judgment, (1 *Saund.* 217.) And the distinction between the actions of debt and trespass on this point, has been, until now, considered as known and established, (1 *Plow.* 66. 6. 8 *Rep.* 120. 133. 2 *Lilly Ab.* 210. 107.) Upon the whole, I am very clear, that this judgment ought to be reversed, and judgment below entered for defendants.

Judgment affirmed, with costs.

JOSEPH PEARSON AND ROBERT Y. BRENT, EXECUTORS OF ROBERT BRENT, DECEASED, PLAINTIFFS IN ERROR, *vs.* THE BANK OF THE METROPOLIS, DEFENDANTS IN ERROR.

In an action against the endorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank. No other notice of the non-payment of the note, was sent to the endorser, but that left for him at the Bank of the Metropolis; and it was proved, that there was an agreement, by parol, with the endorser, as to other notes discounted previously, by the bank, for his accommodation, that payment, and demand of payment, should be made at the bank; the endorser residing a considerable distance from the bank.

The Court held, that parol evidence was admissible, to show the agreement relative to the place where payment of the note was to be demanded; although the agreement did not appear on the face of the note. Such an agreement, is a circumstance extrinsic to the contract made by the note; and its proof, by parol, is regular. {92}

The endorser of such a note, is himself bound by the contract made by the drawer, and by the established and known usage of the bank. {93}

Where it was omitted to allege in the declaration on the note, a demand of payment on the person of the maker, but it averred a demand at the bank, "where the note was negotiable," such averment in the declaration, could not be true, unless there was an agreement between the parties, that the demand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment; and, after a verdict, the judgment will be sustained. {93}

THIS action was instituted in the Circuit Court, for the county of Washington, by the Bank of the Metropolis, on a promissory note, dated May 26th 1819, drawn by George A. Carroll, and endorsed by W. Carroll and Robert Brent, for 1100 dollars, payable at sixty days, and negotiable at the Bank of the Metropolis. The declaration set out the note, and averred a demand of payment, at the Bank of the Metropolis. In support of the issue, on the part of the plaintiffs in error, evidence was offered, that the accommodation given by the said bank, to George A. Carroll, on a note similarly drawn and endorsed with the present, was given by the bank, about three years before the date of the note, on which the suit was brought, and was given with the knowledge of the endorsers thereon, and in consequence of their solicitation: and for the purpose of proving, that it was the agreement and understanding of the bank, and W. Carroll, at the time of agreeing to give him this accommodation, that the note to be discounted should be payable at the Bank of the Metropolis, and the notes severally taken, for the renewal of such notes, and for the continuance of the said accommodation, should be in like manner

payable, and demanded, at the bank; they offered to prove, by parol evidence, that the said Carroll did not reside in the district, after the winter in which W. Carroll lived in the city of Washington—and that that winter, was the winter of 1817; and that after such time, said George A. Carroll occasionally visited the city, and resided at Washington, in Maryland, about twenty miles from the city, and at Port Tobacco; and that many of the notes, taken for the continuance of the said accommodation, were expressed to be payable at the bank; and that all notes, previous to the one now sued on, were there demanded, and such demand acquiesced in, as sufficient, and subsequent notes given in renewal of the notes so demanded; that it was the custom of the said bank to require, in all cases where the drawer was a non-resident, that there should be such an agreement to pay such notes at the bank; that the bank never would have agreed to discount the notes, except upon such a condition, and this was the understanding of the bank, and necessarily presumed to be known to W. Carroll, and the endorsers, at the time of making such accommodation, or at the time of his removal from the city of Washington.

The counsel for the defendants objected to the evidence; but the Court overruled the objection, and admitted the evidence to be given. And the counsel for the defendants, prayed the Court to instruct the jury; that, to enable the plaintiffs to sustain their action aforesaid, against the defendants, it was necessary that a personal demand should have been made upon the maker of the note, for the money in the said note mentioned; but the Court refused to give the instruction; but instructed the jury, that, if from the evidence given as aforesaid, the jury should be satisfied, that it was agreed by all parties, whose names appear on the notes, and the plaintiffs, that the payment should be demanded at the Bank of the Metropolis; and that it was so demanded, at the bank, then a personal demand of the maker, was not necessary. To which several refusals and opinions of the Court, the defendants, by their counsel, excepted, and sued out this writ of error.

Mr. Swann, District Attorney, and Mr. Worthington, for the plaintiffs in error.

1st. Parol evidence cannot be admitted, to show the agreement alleged to have been made: cited, 3 *Stark. Evid.* 4. *p.* 995. 999. 1002. 3 *B. & A.* 233. 8 *Taunt.* 92. 4 *Mass. Rep.* 414. 8 *Johns. Rep.* 187. 2 *Black. Rep.* 1249. 7 *Taunt.* 278. 1 *Cowen.* 249. 14 *Mass. Rep.* 155. 1 *Gow.* 74. 3 *Camp. Rep.* 57. 1 *Taunt.* 347.

2d. As to the custom claimed by the bank. 2 *Stark. Evid.* 455. 1 *Phil. Evid.* 429. 3 *Stark.* 1038-9-40. 9 *Wheat. Rep.* Renner *vs.* Bank of Columbia.

(Brent's Executors vs. The Bank of the Metropolis.)

Mr. Key, for the defendants in error, cited the following cases. *Chitty on Bills*, 237. 12 *Mass. Rep.* 172. Union Bank *vs.* Hyde. 10 *Wheat.* 27—also 7 *Johns. Rep.* 99. 1 *New. Rep.* 172. 1 *Call. Rep.* 250.

Mr. Chief Justice MARSHALL delivered the opinion of the Court:—

This was a suit brought in the Circuit Court of the United States, for the District of Columbia, on a note made by G. A. Carroll, and endorsed by William Carroll and Robert Brent, the testator of the plaintiffs in error, and made negotiable in the Bank of the Metropolis.

The declaration set out the note, and averred a demand of the same, "at the Bank of the Metropolis," where the said note was payable.

At the trial, the plaintiffs below proved that the accommodation given by the bank to said G. A. Carroll, on a note similarly drawn and endorsed with the present, was given by the bank, about three years before the date of the note on which this suit was brought; and was given with the knowledge of the endorsers thereon, and in consequence of their solicitation.

For the purpose of showing an agreement between the bank and the maker of the note, that the note to be discounted, and those thereafter to be made for its renewal, should be payable at the Bank of the Metropolis, and there demanded; the bank proved by parol testimony, that the said G. A. Carroll did not reside in the district after the winter of 1817, in which W. Carroll lived in Washington, but resided at Port Tobacco, in Maryland, about twenty miles from the city, which he occasionally visited; that many of the notes, taken for the continuance of the accommodation, were expressed to be payable at the said bank; and that all the notes previous to that on which this suit was brought, were there demanded, which demand was acquiesced in as sufficient, and subsequent notes given in renewal of those so demanded. The bank also proved that it was its custom, in all cases where the maker was a non-resident, to require an agreement to pay such notes at the bank, and that they never would have agreed to discount the said notes, but on this condition.

The counsel for the defendants below objected to this testimony, but the Court permitted it to go to the jury. The counsel for the defendants below then prayed the Court to instruct the jury, that to enable the plaintiffs to sustain their action, it was necessary to prove that a personal demand had been made on the maker of the note. The Court refused to give this instruction; but did instruct the jury that if they

should be satisfied from the evidence, that it was agreed by all the parties, whose names appear on the notes, that the payment should be demanded at the Bank of the Metropolis, and that it was so demanded, then a personal demand on the maker, was not necessary. An exception was taken to these opinions of the Court, and their correctness is now to be examined.

The plaintiffs in error contend, that the testimony ought not to have been admitted, because it is an attempt, by parol proof, to vary a written instrument. But this is not an attempt to vary a written instrument. The place of demand is not expressed on the face of the note, and the necessity of a demand on the person, when the parties are silent, is an inference of law, which is drawn only when they are silent. A parol agreement puts an end to this inference, and dispenses with a personal demand. The parties consent to a demand, at a stipulated place, instead of a demand on the person of the maker; and this does not alter the instrument, so far as it goes, but supplies extrinsic circumstances, which the parties are at liberty to supply.

No demand is necessary to sustain a suit against the maker. His undertakIng is unconditional, but the endorser undertakes conditionally to pay, if the maker does not; and this imposes on the holder the necessity of taking the proper steps to obtain payment from the maker. This contract is not written, but is implied. It is, that due diligence to obtain payment from the maker shall be used. When the parties agree what this due diligence shall be, they do not alter the written contract, but agree upon an extrinsic circumstance, and substitute that agreement for an act which the law prescribes only where they are silent. We think, then, that there was no error in admitting the parol evidence which was offered to sustain the action.

If the testimony was admissible, there is no error in the instruction given by the Court. It was, that if the jury believed, from the evidence, that it was agreed by all the parties, that the demand should be made at the Bank of the Metropolis, and that it was so made; then a demand of the maker was not necessary.

This point is, we think, involved in the question respecting the admissibility of parol testimony, to establish the agreement. Had the note purported on its face to be payable at the Bank of the Metropolis, that express agreement would undoubtedly have dispensed with a personal demand. If that agreement can be made by parol, (and unless it can, the testimony was inadmissible,) the effect of the parol contract is the same on this point, as if it had been in writing. The only

inquiry therefore is, whether the testimony was sufficient to be submitted to the jury for the purpose of proving the agreement. We think it was.

The circumstances, that the endorsers were themselves active in procuring the accommodation for the maker of the note; that the accommodation had been continued for years without a demand on the person of the maker; that it was the invariable usage of the bank, when the maker of an accommodation note resided out of the city, to require, as the condition of the loan, a stipulation that a demand at the bank should be sufficient; that this accommodation would not have been continued, after the removal of the maker out of the city, but on this condition; that the note purports, on its face, to be negotiable at the Bank of the Metropolis; are facts, from which the jury might justifiably infer the agreement of the parties to dispense with a demand on the person of the maker.

A verdict having been rendered for the bank, the defendants in the Court below filed errors in arrest of judgment.

The error alleged, is, that the first count in the declaration neither charges a personal demand on the maker of the note, nor excuses the omission to make such demand. The declaration certainly does not charge a demand on the person of the maker; but this was not necessary, if the parties had agreed that a demand at the bank should be substituted for a demand on the maker.

The plaintiffs in error contend, that the agreement is not alleged in the declaration, and we admit that the omission to make this averment would be fatal. In that event, the plaintiff below would have shown no cause of action. But the declaration avers a demand of the note, "at the Bank of the Metropolis," where the said note was payable. The note is set out in the declaration, and does not purport, on its face, to be made payable at the bank. But the averment in the declaration, that it was payable there, cannot be true, unless there was an agreement of the parties to that effect. It is an averment which must have been proved at the trial, or the plaintiff below could not have obtained a verdict and judgment.

After a verdict, it is, we think, sufficient to sustain the judgment.

There is no error, and the judgment is affirmed, with costs.

PHILIP HICKIE AND OTHERS, HEIRS AND LEGAL REPRESENTATIVES OF JAMES MATHER, DECEASED, APPELLANTS, *vs.* ALEXANDER B. STARKE AND OTHERS, HEIRS AND LEGAL REPRESENTATIVES OF ROBERT STARKE, DECEASED, APPELLEES.

In the construction of the 25th section of the Judicial Act, passed 24th of September 1789, this Court has never required, that the treaty, or Act of Congress, under which the party claims, who brings the final judgment of a state Court into review before this Court, should have been spread upon the record. It has always deemed it essential to the exercise of jurisdiction, in such a case, that the record should show a complete title, under the treaty, or Act of Congress, and that the judgment of the Court is in violation of that treaty or Act. {98}

In order to bring himself within the protection of the Act of cession by Georgia to the United States, for the land, the party must show that he was "actually settled" on the land, on the 27th of October 1795, the period mentioned in the said Act of cession. {98}

It seems, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient to constitute "an actual settlement," within the meaning of the law; though the proprietor should not reside, in person, on the estate, or within the territory. {98}

IN the Supreme Court of the county of Adams, in the state of Mississippi, the appellees filed a bill in chancery against the appellants; which, according to the laws of the state, was transferred to the Supreme Court, where judgment was given for the complainants.

The purpose of the bill was to obtain a conveyance of a tract of land, containing 2000 acres; for which Robert Starke, in 1791, under whom the complainants claimed, obtained an order of survey from the Governor-General of Louisiana, which order was executed by the deputy surveyor, and of which land he afterwards took possession, and cultivated for years. Subsequently, Robert Starke being willing to exchange this body of lands for another, proposed the same to the governor of Louisiana. The bill alleged, that, from some personal hostility towards him, an offer of the land so held by him was made to James Mather, the ancestor of the appellants, the defendants in the bill; and a grant of the land was made in 1794, to James Mather, by the governor of Louisiana, who thereupon entered, and cultivated part of the tract.

It was admitted, that all the forms required by the established laws and customs of Louisiana, while under the Spanish government, by which a full and complete title to land was acquired, had not been conformed to, by Robert Starke, or his heirs, the appellees; and that the title of James Mather was,

in all respects, full and complete, as a legal title, under those laws. The appellees, in their bill, claimed to have the land conveyed to them, as the title of the appellants had been acquired by collusion with the governor of Louisiana; and that Robert Starke had been forcibly, and against his will, dispossessed of the land. Under the authority of the Supreme Court of Mississippi, a feigned issue was tried, to determine "whether the ancestor of the complainants ever made a voluntary abandonment of his right to the premises in question, free from any undue influence on the part of the Spanish government of its officers."

This issue was found, by the verdict of a jury, in favour of the complainants; and the same having been certified to the Supreme Court, a decree was made in favour of the complainants, the appellees. The appellants then filed their petition for a writ of error, to the Supreme Court of the United States; suggesting, that the title of James Mather arose "under the articles of agreement and cession," between the United States and the state of Georgia, and that by the decree of the Supreme Court, that title has been overruled. The argument before the Court, was principally confined to two questions; upon the determination of which, the jurisdiction of the Court in the case, depended.—

1. Whether the construction and effect of the articles of agreement and cession, between the United States and the state of Georgia, were presented for the consideration of the Supreme Court of Louisiana, in the investigation of this case; so that, by the decree of the Court, the title claimed by the appellants, under the articles of agreement, was brought into question?

2. Whether the appellants' title, being a full and complete Spanish grant, was confirmed by "the articles of agreement and cession," and was in itself a valid and indefeisible grant of the land?

The only facts connected with the discussion of the case before this Court, were those which related to the actual possession of the land by James Mather, and the period of the same. They are sufficiently noticed in the decision of the Court.

Mr. Livingston, for the appellants.—

The question of jurisdiction rests upon the fact, whether the construction of "the articles of agreement and cession," was before the Court giving the decree for the appellees.

The articles provide, that all complete grants made by the Spanish or British governments, prior to the acquisition of Louisiana, by the United States; and all incomplete grants made by the state of Georgia, before "the articles," shall be confirmed by the United States.

(Hickie et al. vs. Starke et al.)

The complainants' bill admits, that the appellants, the defendants in the Supreme Court of Louisiana, had a complete grant from the Spanish government of Louisiana, and thus the title of the appellants was brought before the Court; and this title was made valid, by the "articles of agreement and cession." The evidence in the case also fully establishes the Spanish title of the appellants, and this is shown in every part of the record; the omission of the appellants to plead this title, thus acknowledged, or thus proved, ought not to defeat it. (7 *Wheat.* 164. 201.) The petition for a writ of error to the Judge of the Supreme Court of Louisiana, states, that the title of the appellants, is claimed under the "articles of agreement and cession;" and as he signs the allowance of the writ, the fact of the title having been before him, is sufficiently shown. As to the non-compliance, by the appellants, with the provisions of the Act of Congress of 3d March 1810, which provide for the registering of claims, under the Spanish and British government, it was said—

1. Congress cannot pass a law to affect a title, which has been declared complete by the "articles of agreement and cession."

2. If that law is valid, the fact of forfeiture by non-registration, must be ascertained by some proceeding, before the title can be considered as lost.

3. The provisions of the law refer to British grants, which were of a particular nature, and which were required to be exhibited to, and registered with the commissioners; and not to Spanish grants.

Both parties to the case, claim under a law of the United States; and, by the 25th section of the Judiciary Law, the jurisdiction of this Court extends to all such cases. As to jurisdiction, there was cited, 4 *Cranch*, 482. 4 *Wheat.* 348. 5 *Cranch*, 348.

Mr. M'Duffie and Mr. Coxe, for the appellees.—

The Court will not entertain jurisdiction of this case, but to a limited extent, if it shall consent to assume any jurisdiction over it; as the whole of the facts, upon which the equitable title of the appellees rested, having been peculiarly within the jurisdiction of the Supreme Court of Louisiana, sitting in chancery, and the decision of that Court, having affirmed these facts; they will remain unaffected, by any proceedings here. 1 *Wheat.* 352. 2 *Ibid.* 363. 6 *Ibid.* 379. 390. 7 *Ibid.* 208.

In the Chancery Court of Mississippi, "the articles of agreement and cession" were not noticed; and the decree was exclusively upon the equitable title of the complainants in the bill. This being the fact, it cannot be alleged here, that the construction of these articles was brought into question.

(Hickie et al. *vs.* Starke et al.)

In order to maintain the jurisdiction of this Court, it must be shown, that the title under "the articles, &c.," was decided upon by the Court.

2. "The articles of agreement and cession," look forward to the performance of certain acts, under the laws of the United States. The 5th section of the Act of Congress of 1803, requires, that titles claimed under Spanish grants, shall be exhibited to a Board of Commissioners, to be appointed for the purpose of examining and registering the same; and, until it shall be shown, that the appellants have a grant under the Spanish government, and that the same was exhibited and registered according to the provisions of the law, they are precluded from claiming title under "the articles of agreement and cession." The articles of agreement were not intended to extend further than to adjust the claims of the United States, and the state of Georgia, to the lands; and not to settle those of individuals. Henderson *vs.* Poindexter, 12 *Wheat.* 543. Congress had no power to legislate, so as to deprive any one of an equitable title, and consequently the articles of agreement could not take away the appellees' title, existing before the cession.

3. The appellants are bound to show a good and perfect title, under the agreement with Georgia, and the laws of the United States; and that they were in possession of the property. The grant from Spain, must have been legally executed, according to the Spanish laws; and, under these laws, the prior equitable title of the appellees, would have been regarded and enforced. 7 *Partidas*, 16th, 17th title. The operation of "the articles," cannot be such, as will give validity to a title originating in fraud or violence; nor will this Court say, that a title originating thus shall be sustained; or that the decision of an inferior Court, upon the facts of fraud and violence, was erroneous. Cited 7 *Wheat.* 206. 6 *Ibid.* 379.

The Supreme Court of Mississippi did not decide, that the title held by the appellees, was invalid; but that it was a legal title, which could not, *in conscience*, be held by the appellants; and that they should convey the same to the complainants, the appellees. A Court of Chancery does not decide on the title to land, directly, but only operates on the same, collaterally.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error, to a decree pronounced in the Court of the last resort, in the state of Mississippi, directing the plaintiffs in error, to convey to the defendants, a certain tract of land, in the said proceedings mentioned. The plaintiffs in error allege, that their title was secured by the compact entered into between the United States and Georgia, for the ces-

sion of the country in which the land lies; and that this decree is in violation of that compact. The defendants insist, that the compact between the United States and Georgia, was not called into question; and that the 25th section of the judicial act, does not give this Court jurisdiction of the case.

In the construction of that section, the Court has never required that the treaty, or Act of Congress, under which the party claims, who brings the final judgment of a state Court into review before this Court, should have been pleaded specially, or spread on the record. But it has always been deemed essential to the exercise of jurisdiction in such a case, that the record should show a complete title under the treaty or Act of Congress, and that the judgment of the Court is in violation of that treaty or Act. The condition in the Cession Act, on which the plaintiffs in error rely, is in these words:—"That all persons, who, on the 27th day of October 1795, were actual settlers within the territory thus ceded, shall be confirmed in all the grants, legally and fully executed prior to that day, by the former British government of West Florida, or by the government of Spain."

The plaintiffs produce a grant, legally and fully executed; but to bring the case under the treaty, they must also prove, that the ancestor or person under whom they claim, was an actual settler, on the 27th October 1795. The answer asserts, that the warrant of survey issued on the 7th day of February 1793, and the survey made on the 20th July, in the same year, when possession was taken; and that the patent issued on the 3d April 1794. James Williams deposes, that about the 3d December 1795, he took possession of the tract of land in dispute, as overseer for James Mather the patentee, and understood from him, that he had gone to Natchez some time before, to apply for land in the part of the country where the tract in controversy lies. This is the testimony furnished by the record, to prove that James Mather, the grantee, was an actual settler, according to the requisition of the Cession Act of Georgia. In Henderson *vs.* Poindexter, 12 *Wheat.* 530, the term "actual settler," seems to have been understood as synonymous with the resident of the country. That case, however, did not require that the precise meaning of the term should be fixed, and the Court is disposed to think, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient; though the proprietor should not reside in person on the estate, or within the territory. Had the settlement proved by Williams, been made at the day required by the Cession Act, it would, we think, have satisfied the requisition of that Act, and entitled the plaintiffs in error to the benefit of the condition. But it was not made until the 3d of De-

cember 1795. We think then, that the plaintiffs in error have failed to prove, that the person under whom they claim, was an actual settler on the 27th day of October 1795; and that the Court has no jurisdiction of the cause.

The writ of error dismissed, it not appearing that this Court has jurisdiction of the cause.

THE UNITED STATES, APPELLANTS, *vs.* THE SALINE BANK OF VIRGINIA, JOHN WEBSTER, AND OTHERS, APPELLEES.

The plaintiffs, as creditors of an unincorporated bank, filed a bill against the Cashier, and a number of persons, stockholders of the bank, for a discovery and relief; who, in reply to the bill, state, that their answers to the bill would subject them to penalties, under the laws of Virginia, prohibiting unincorporated banks: held, that the defendants were not bound to make any discovery, which would expose them to penalties. {104}

THIS case came before the Court, on an appeal by the United States, from the decree of the District Court of the United States, for the western district of Virginia; in which Court, the District Attorney of the United States, filed a bill against John Webster, Cashier, and a number of others, as stockholders of the Virginia Saline Bank, to charge them, in their private capacities, for certain deposits of money made with them, and also to subject their joint funds, &c.

The bill charges, that about the year a company was formed by a number of persons, citizens of Virginia, within that district, to carry on the usual and ordinary business of banking. That they established a banking house—assumed the name and style of the "President, Directors, and Company of the Saline Bank of Virginia." That they issued notes, or bills, purporting to be payable out of the joint funds—to make discounts and exchanges, whereby circulation and currency was given to their notes and bills. That in discharge of public dues, 10,120 dollars of their notes, were paid into the Treasury of the United States, before the 21st of October 1819; and, on that day, 5,831 dollars, in said notes, were deposited by an agent of the Treasury, with John Webster, Cashier of the said association, who demanded payment therefor, after obtaining a certificate of deposite; which payment was refused by Webster, who said he had no funds.

At the same time, the agent presented a draft drawn by the Treasurer of the United States, for 4,290 dollars, being also for their notes received in the Treasury, which was the balance of the said sum of 10,120 dollars. This draft was refused also, for want of funds. The bill charges, that Webster possessed funds of the company in specie and notes of solvent chartered banks, and combined with individuals of the company to refuse payment, by fraudulently secreting these funds. The bill prays an account of the funds of the company, and also, to subject the Cashier and stockholders to a personal decree.

(The United States vs. The Saline Bank of Virginia et al.)

There was filed with the bill, the following documents mentioned therein:—

1. "Virginia Saline Bank, October 21st 1812, William Wham has deposited in this bank, 5,831 dollars, in notes of the same, for safe keeping—to be returned to him, or his order."

J. WEBSTER, *Cashier.*

2. "Virginia Saline Bank, 21st October 1819. I certify, that William Wham, Cashier of the Bank of Columbia, acting as agent for the Treasurer of the United States, this day demanded payment of my receipt of this date, in his favour, for 5,831 dollars. That he presented a draft drawn by the Treasurer of the United Sates, No. 9,079, dated 18th March 1818, in favour of Jonathan Smith, for 4,290 dollars, and demanded payment for the said deposite and the said draft; whereunto I answered, that I was not prepared with funds, and could not pay the said draft, or deposite, at this time."

J. WEBSTER, *Cashier.*

The above-mentioned draft, drawn by the Treasurer, is in these words:—

No. 9,079, Reg'd. March 18th 1818,
for the Register,
J. DAWSON.

No. 9079, Dr. 4,290.
Treasury of the United States,
Washington, March 18, 1818.

Sir: At sight, pay to Jonathan Smith, Esq. Cashier Bank United States, four thousand two hundred and ninety dollars, value received.

T. T. TUCKER,
Trea. U. States.

JOHN WEBSTER, Esq.
Cashier Virginia Saline Bank.

To the bill of the United States, the defendants filed the following joint and several plea, with the usual affidavit:—

These defendants, by protestation, not confessing or acknowledging all, or any of the matters and things in the complainants' said bill of complaint contained, to be true, in such manner and form, as the same are therein alleged, and set forth, for plea thereunto say, that the company which assumed the name and style of the "President, Directors, and Company, of the Saline Bank of Virginia," whereof mention is made in the said bill of complaint, had not, at the time of the issuing, or of giving currency or circulation to the notes or bills in the said bill of complaint mentioned, or at any time hitherto, any charter incorporating the said company with authority to deal or trade as a bank, or any charter whatsoever; and these defendants further say, that all the notes and bills issued by the said

(The United States vs. The Saline Bank of Virginia et al.)

company, and to which circulation and currency was given, as in and by the complainants' bill is supposed, were entitled and offered in payment by the said company, to wit: at the time of the issuing of the said notes and bills, as charged and supposed by the said bill of complaint, to wit, at the western judicial district of Virginia; and these defendants aver, that all the matters and transactions in the said bill of complaint stated, and whereof discovery is sought, relate to the emission of the said bills and notes by the said company, and to the offering the same in payment as aforesaid, all which matters and things, these defendants are ready to aver, maintain, and prove, as this honourable Court may award; and these defendants are advised, and insist, that they ought not to be compelled to discover, or set forth any matters, whereby they may impeach or accuse themselves of any offence or crime, or be liable by the laws of the commonwealth of Virginia, to penalties and grievous fines; for which cause, these defendants humbly pray the judgment of this honourable Court, whether they shall be compelled to make any other or further answer to said bill of complaint, and humbly pray to be hence dismissed, &c.

J. PINDALL, Defendants' Attorney.

The cause was set for argument, on this plea, by consent. The District Court sustained the plea, and dismissed the bill. From which decree, the United States appealed to this Court.

The record contains the articles of association called for by the bill, with a list of the subscribers, the 4th article whereof, is in these words, viz: "No stockholder shall be answerable in his person, or individual property, for any contract or engagement of the said company, or for any losses, deficiencies, or defalcations of the capital stock of the said company; but the whole of the said capital stock, together with all the rights and credits, and all the property, both real and personal, belonging to the said company, and nothing more, shall, at all times, be answerable for the legal and equitable demands against the said company."

By the articles of association, it appeared, that the subscription of the stock of the company, began on the 14th of August 1814.

The legislature of Virginia, had thrice enacted laws on the subject of unincorporated banking companies, in February and in November 1816; and in August 1817. *Tate's Digest*, 41, 42.

The following are the provisions of the laws of Virginia upon this matter:—

1. It shall not be lawful for any association, or company, not having a charter incorporating such association or company, with authority to deal or trade as a bank, now formed or in being, or which hereafter may be formed within the limits of

this Commonwealth, for the purpose of discounting notes, bills, or other securities, for the payment of money or other valuable thing, and issuing notes, drafts or bills, whether payable to order or bearer, or any other securities for the payment of money or other valuable thing, in the name, or on account, or for the benefit of, any such association or company, or otherwise for the purpose of dealing, trading, or carrying on business as a bank; to commence or continue the discounting of any notes, or bills, or other securities, for the payment of money or any other valuable thing, or the issuing of any notes, drafts or bills, or other securities for the payment of money, or other valuable thing, or such dealing, trading, or carrying on business, as a bank; and every member, officer or agent of any such company or association, that may so commence or continue such discounting or issuing of notes, drafts, bills, or other securities, or the dealing, trading, or carrying on business as a bank, shall be held and taken to be guilty of a misdemeanor, and, upon conviction thereof, on indictment, information or presentment, shall be liable to be fined at the discretion of a jury, in a sum not less than one hundred, nor exceeding five hundred dollars. And, if any such company or association, or any president, manager, cashier, or other officer or agent of such company or association, shall pay out, deliver, put in circulation, or issue any note, draft, bill, or other security, for the payment of money or other valuable thing, purporting to promise, order, request or stipulate the payment of money or other valuable thing, or that money or other valuable thing is payable by, or on behalf of such company or association, or any person or persons as agent or agents thereof; each member, officer and agent thereof shall be, in like manner, liable to the same penalty.

All contracts that hereafter may be made by individuals for the purpose of forming themselves into any association or company, for discounting and issuing notes and other securities, for the payment of money or other valuable thing, as mentioned in the first section of this Act, or dealing, trading, or carrying on business as a bank; shall be, and the same are hereby declared to be utterly null and void.

2. The capital stock of any association or company, trading, discounting paper, or issuing notes, in violation of this Act, and all capital stock subscribed to such association or company; shall be held in trust for the benefit of the commonwealth, and it shall be the duty of the Attorney General, whenever he shall be informed of the existence of any such company or association, to institute a suit in the Superior Court of Chancery for the district of Richmond, in behalf of the Commonwealth, for the purpose of recovering the capi-

(The United States *vs.* The Saline Bank of Virginia et al.)

tal stock aforesaid. In such suit, it shall be lawful to make all or any of the members of such company or association, and any officer, agent or manager thereof, parties defendant—and to call upon and compel them, or either of them, to exhibit all their books and papers, and an account of all such matters and things as may be necessary to enable the Court to make a decree in pursuance of the provisions of this Act. The members of any such association or company, made defendants in such suit, shall be held severally liable to the Commonwealth for their respective proportions of the capital stock held in such company or association, at the institution of such suit, or the time of the decree, or by any person or persons, for his, her or their benefit; and the Court shall decree against the defendants, respectively and severally, the amounts that they and each of them may respectively and severally hold as aforesaid, in the capital stock of such company or association, or by any person or persons for his, her, or their use or benefit, to be levied of the proper goods and chattels, lands and tenements of such defendants: *Provided, however*, That no disclosure made by any party defendant to such suit in equity, and no books or papers exhibited by him in answer to the bill, or under the order of the Court, shall be used as evidence against him in any motion or prosecution under this law—and that a recovery in such suit shall be a bar to every motion or prosecution against any defendant to such suit for the recovery of any penalty, or the infliction of any punishment prescribed by this Act.

See also 1 *Randolph's Rep.*, 71 to 101 inclusive.

The case was submitted to the Court without argument, by the Attorney General of the United States; and by Messrs. Webster and Dodridge, for the appellees.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This is a bill in equity for a discovery and relief. The defendants set up a plea in bar, alleging that the discovery would subject them to penalties under the statute of Virginia.

The Court below decided in favour of the validity of the plea, and dismissed the bill.

It is apparent that in every step of the suit, the facts required to be discovered in support of this suit would expose the parties to danger. The rule clearly is, that a party is not bound to make any discovery which would expose him to penalties, and this case falls within it.

The decree of the Court below is therefore affirmed.

DANIEL RHEA AND OTHERS, APPELLANTS, *vs.* DANIEL RHENNER, APPELLEE.

The law seems to be settled, that when the wife is left by the husband, without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. {108}

By the laws of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years; and shall not have been heard of during that time. {108}

By those laws, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join in it. The separate examination and other solemnities required by law are indispensable, and must not be omitted. A deed therefore, executed by a married woman, of real property, acquired by her while a *feme sole* trader, while she was abandoned by her husband, is void. {109}

THIS was an appeal from the Circuit Court of the District of Columbia, and county of Washington; where a bill had been filed by Daniel Rhenner, the appellee, against Daniel Rhea and Elizabeth his wife, and William Erskine, an infant, the son of Elizabeth Rhea, by a former husband, Robert Erskine.

Mr. Cox, for the appellants:—

1. This case stood before the Circuit Court, as to Elizabeth Rhea, upon the bill and answer; although there may have been a replication, yet no proof having been taken, the hearing was upon the bill and answer only.

The proceeding is altogether irregular as to William Erskine the infant; the rule being, that when redress is sought against an infant, all the averments must be made out by proof.

2. Two contracts are set out in the bill, one of which is a parol contract, and which is denied on the answer; no proof was given that such a contract had been made, and yet the decree proceeds upon it, as if it had been proved.

3. The deed executed by Daniel Rhea and wife, to the appellee, states the consideration to be a debt due by Daniel Rhea, to the grantee; and the bill alleges the debt to have been one of Elizabeth Rhea. The parties to a deed, are not allowed to contradict it. 1 *Vez. Rep.* 128. 2 *Pierre Williams*, 204.

4. Elizabeth Rhea, being at the time the debt arose, the wife of Erskine, could make no contract.

A married woman may act as a *feme sole* trader, but it does

not follow, that she can execute a deed. The deed of a married woman is absolutely void; and to constitute a deed an estoppal, it should be a valid deed.

5. It was not a sufficient consideration for the wife of Daniel Rhea, to pass property away from her own son, for the payment of a debt which, by this deed of conveyance, is stated to be due by Daniel Rhea, to the appellee.

Mr. Key for the appellee.

The Court below have not given a decree upon the alleged parol agreement. The decree allows the property to be sold for the payment of the plaintiffs' claims, the proceeds to be brought into Court, where the amount of these claims must be proved. Elizabeth Rhea was left by her former husband, Erskine, in 1814, carried on business as a *feme sole* trader, in Georgetown, and as such acquired the lot of ground conveyed to the appellee; she having contracted the debt to the appellee, in the course of her trading. The husband having allowed her to contract debts and to purchase property, thereby consented that the property should be liable for her debts.

This is a proceeding in a Court of Equity, to sustain a claim, the justice of which cannot be denied; and it is easier to do so in such a proceeding, than it would be in a Court of Law. 2 *Vernon*, 614. 104. *Prec. in Chancery*, 328.

The absence of the husband, Erskine, is equivalent to abjuration of the realm, or banishment; in either of which cases, the contracts of a married woman are valid by the law of England. 1 *Bos. and Pull.* 357. 2 *Esp. Rep.* 554. 4 *Esp. Rep.* 27.

The deed acknowledged by a privy examination is an estoppal. Cases cited, *Coup.* 232. 7 *Mass.* 14. 19.

Mr. Justice DUVAL delivered the opinion of the Court.—

This case is brought up, by appeal, from the Circuit Court for the district of Columbia and county of Washington, sitting in equity.

The appellee, who was complainant, in the Court below, filed his bill in equity, in the year 1822, in the Circuit Court, against Daniel Rhea, and Elizabeth his wife, and William Erskine, an infant son of said Elizabeth. The bill alleges, that Elizabeth Rhea, formerly Erskine, was indebted to the complainant in the sum of 300 dollars, for goods sold and delivered;—that being pressed for payment, she, with the defendant, Rhea, with whom she then lived, agreed, that if allowed further time, they would secure the debt, by conveying to Rhenner a lot of ground, No. 165, in Beatty & Hawkins's addition to Georgetown; which was the property of said Elizabeth, and which had been conveyed to her, by the name of Elizabeth Erskine.

That Rhea, together with the said Elizabeth, by their deed,

bearing date May 13th 1819, conveyed to the complainant the lot of ground before mentioned, for the purpose of securing the debt, with interest; and stipulated, that, if the debt was not paid in two years, it should be held in trust, with power to sell the same, and apply the proceeds, &c.

The bill further states, that the said Daniel and Elizabeth, a few days before the date of the deed to the complainant, viz: on the tenth of May 1819, but after the agreement to convey to the complainant, fradulently conveyed the same premises to the defendant, Erskine, an infant son of said Elizabeth, in fee, in consideration of natural love and affection;—that he, the said Rhenner, had, at a considerable expense, at the request, and with the knowledge and approbation of the defendants, erected improvements on the lot, and put a tenant in possession of the same; but that the defendant, by collusion, soon after obtained possession of the same, and still keep it, claiming to hold it under the deed to the infant. The bill concludes with praying, that the deed to William Erskine may be declared void, and that the property may be sold to pay his claim, &c.

The defendant, Daniel Rhea, in his answer, admits, that his wife, before his intermarriage with her, viz: in May 1819, was the wife of one Robert Erskine, and was engaged in carrying on business for herself;—that he did agree to join, and did join her, in the conveyance to the complainant, and in that to her son;—that he had no title or interest in the premises;—that the property belonged, in May 1819, to Elizabeth Erskine, who was a married woman; and he denies all the other allegations in the bill.

Elizabeth Rhea, in her answer, avers, that she was married to Robert Erskine in January 1812;—that after her marriage, in the absence of her husband, one Adam Mayne conveyed to her the premises mentioned in the bill of complaint; the deed bears date on the 7th of April 1817;—that her husband, Erskine, left her in the year 1814, and she believed he was alive in May 1819; and that she was not, at that time, the wife of Daniel Rhea;—that in July 1821, Erskine having then been beyond seas more than seven years, she married Daniel Rhea; having received no support from her former husband, since he left her.

The answer of the infant is put in by his guardian, in the usual form, submitting to the protection of the Court; without admitting or denying any of the facts alleged in the bill.

In this state of the proceedings, the Court decreed a sale of the lot before mentioned, for payment of the claim of the complainant; and appointed a trustee to make the sale, under the terms prescribed in the decree; reserving the claim of the complainant for proof on it, and further order. From this decree,

there was an appeal, and the cause is now before this Court for their decision. The question submitted by the arguments of the counsel is, whether the contracts and engagements of Elizabeth Rhea, made in the absence of her first husband, and prior to her marriage with the defendant, Rhea, are obligatory; and to what extent a woman who has been abandoned by her husband, may contract debts, for which she is personally liable.

The law seems to be settled, that, when the wife is left without maintenance or support, by the husband, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts. And the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. It is for the benefit of the *feme covert*, that she should be answerable for her debts, and liable to an action in such a case; otherwise she could not obtain credit, and would have no means of gaining a livelihood. A decision to this effect, by the Court of Common Pleas, in England, is reported in 1 *Bos. & Pull.* 359. In delivering the opinions of the Court, Mr. Justice Buller refers to the case of Lady Belknap, whose husband was exiled. She was permitted to sue in her own name. The husband of Lady Sandys, was banished by Act of Parliament during life; and it was decreed, in her case, that she might, in all things, act as a *feme sole*, and as if her husband was dead; and that the necessity of the case required she should have such power, (1 *Vernon*, 104.) And the same reason applying, where the husband had abjured the realm, the wife, in that case, was allowed to sue as a widow for her dower. In such case, she has been permitted to alien her land, without her husband, and is exempted from the disabilities of coverture. It has been uniformly considered, that banishment, or abjuration, is a civil death of the husband. In the case of Deborah Gregory *vs.* Paul, executor of Warburton; reported in the 15th volume of *Mass. Rep.*; all these cases are reviewed by the Supreme Judicial Court of Massachusetts; and the law recognised. In the case under consideration, there was a voluntary abandonment of the wife, by the husband, without having furnished her with the means of support. In his absence, she traded and dealt as a *feme sole*, and is liable for her debts. When the deeds for the lot aforementioned was executed, her husband had been absent five years only; she continued under a coverture, and was the wife of Robert Erskine, her first husband. There is no evidence that she was, at that time, married to Daniel Rhea; and if the marriage had been proved, it would have been illegal and unavailing. A *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, with impunity, until her husband shall have been absent seven

years, and shall not have been heard of, during that time. But by the laws of Maryland, which must govern in this case, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed, to pass real estate, unless he shall join her in the deed.

The separate examination, and other solemnities, required by law, are indispensable, and must not be omitted. The deeds executed by her and Daniel Rhea, in May 1819, are, therefore, inoperative and void.

The Circuit Court decreed, in this case, upon the bill annexed and exhibits, without further testimony. They do not, in themselves, contain sufficient matter for a decree.

It does not appear that any evidence was taken on commission, or otherwise, to establish, or disprove, the material allegations in their bill.

The record being thus defective, this Court cannot make a final decision. The decree of the Circuit is reversed, and the record remanded for further proceedings.

SUNDRY AFRICAN SLAVES, THE GOVERNOR OF GEORGIA, CLAIMANT, APPELLANT, *vs.* JUAN MADRAZO.

THE GOVERNOR OF GEORGIA, APPELLANT, *vs.* SUNDRY AFRICAN SLAVES, JUAN MADRAZO CLAIMANT.

In the District Court of the United States, for the district of Georgia, a libel was filed, claiming certain Africans, as the property of the libellant, which had been brought into the state of Georgia, and were seized by the authority of the governor of the state, for an alleged illegal importation; process was issued against the slaves, but was not served. The case was taken by appeal to the Circuit Court, and the governor of Georgia filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the Circuit Court, &c. Held that such a stipulation could not give jurisdiction in the case to the Circuit Court; as process could not issue legally from the Circuit Court against the Africans; because it would be the exercise of original jurisdiction in admiralty, which the Circuit Court does not possess. {121}

"It may be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record." {122}

The libel and claim exhibited a demand for money actually in the treasury of the state of Georgia, mixed up with the general funds of the state, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the state to exercise—Held that the Courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendment to the Constitution of the United States. {123}

In a case where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record. {124}

THESE cases were brought before this Court, from the Circuit Court of the United States for the district of Georgia, under the following circumstances.

The schooner Isabelita, a Spanish vessel, owned by Juan Madrazo, a native Spanish subject, domiciliated at Havana, was despatched by him with a cargo, his own property, in the year 1817, on a voyage to the coast of Africa, where she took in a cargo of slaves. On her return voyage she was captured by a cruiser called the Successor, under the piratical flag of Commodore Aury; the said cruiser being then commanded by one Moore, an American citizen; and having been fitted out in the port of Baltimore, and manned and armed in the river Severn, within the waters and jurisdiction of the United States. The Isabelita and the slaves on board, were carried to Fernandina, in Amelia Island, and there condemned by a pretended Court

of Admiralty, exercising jurisdiction under Commodore Aury; and sold, under its authority, by the prize agent, Louis Segallis, to one William Bowen. The negroes, so purchased by Bowen, were conveyed into the Creek nation, in consequence, as it was alleged, of the disturbed state of East Florida, the insecurity of property there, and with a view to their settlement in West Florida; then a province of the Spanish monarchy. Being found within the limits of the state of Georgia, they were seized by an officer of the customs of the United States, and delivered to an agent appointed by the governor of Georgia, under the authority of the Act of the Legislature of that state, passed in conformity to the provisions of the Act of Congress of March 1807, prohibiting the importation of slaves into the United States; the negroes having been so brought into the United States, in violation of that Act.

Some of the negroes were sold by an order of the governor, without any process of law, and the proceeds paid over to the treasurer of Georgia. The residue of the negroes are in possession of an agent, appointed by the governor of Georgia.

The Isabelita was fitted out as a cruiser at Fernandina; taken by Moore to Georgetown, South Carolina; seized there by the United States, sent round to Charleston; libelled in the District Court of South Carolina; and, by a decree of that Court, restored to Madrazo, the claimant.

The governor of Georgia filed an information in the District Court of the United States for the district of Georgia; praying that a part of these Africans, which remained specifically in his hands, might be declared forfeited, and may be sold.

A claim was given in, in this case, by William Bowen; Juan Madrazo, the libellant in the other case, did not claim.

The decree of the District Court dismissed the claim of William Bowen, and adjudged the negroes to be delivered to the governor of Georgia, to be disposed of according to law.

William Bowen appealed to the Circuit Court, by which Court his claim was dismissed; and from the decree of that Court, dismissing his claim, he has not appealed.

Juan Madrazo filed his libel in the District Court of Georgia, alleging, that a Spanish vessel called the Isabelita, having on board a cargo of negroes, was piratically captured on the high seas, carried into the port of Fernandina, there condemned by some pretended tribunal, and sold;—that the negroes were conveyed, by the purchaser, into the Creek nation, where they were seized by an officer of the United States, and by him delivered to the government of the state of Georgia; pursuant to an Act of the General Assembly of the state of Georgia, carrying into effect an Act of Congress of the United States;—

that a part of the said slaves were sold, as permitted by said Act of Congress, and as directed by said Act of the General Assembly of the said state, and the proceeds thereof deposited in the treasury of the said state;—that part of the said slaves remain undisposed of, under the control of the governor of the said state, or his agents; and prays restitution of said slaves and proceeds. Claims were given in by the governor of Georgia, and by William Bowen. The District Court dismissed the libel, and the claim of William Bowen. From this appeal, Juan Madrazo appealed to the Circuit Court.

The Circuit Court dismissed the libel and claim of the governor of Georgia, and directed restitution to the libellant; and from this decree, appeals have been taken by the state of Georgia, and by William Bowen. A warrant of arrest was issued by the District Court, but was never served. A monition also issued, and was served, on the governor and treasurer of the state of Georgia.

In the Circuit Court, the following proceedings took place:—"On motion of the proctors of the libellant, Madrazo, ordered, that he have leave to renew his warrant, for the property libelled; but it shall be held a sufficient execution of such warrant, if the governor, who appears as claimant, in behalf of the state, will sign an acknowledgment, that he holds the same subject to the jurisdiction of this Court."

Whereupon the following instrument was filed, December 24th, 1823:—

Executive Department, Milledgeville, May 15th 1823.

The executive having been furnished by the deputy marshal with the copy of an order, passed by the Circuit Court of the United States, in relation to certain Africans, the title to which is a matter of controversy in said Circuit Court, and also in the Superior Court of the county of Baldwin, makes the following statement and acknowledgment, in satisfaction of said order and notice.

Juan Madrazo
vs.
Sundry Africans.
} Libel in admiralty, against sundry African negroes.

The governor of the state of Georgia acknowledges to hold sundry African negroes, now levied on, by virtue of sundry executions, by the sheriff of Baldwin county, subject to the order of the Circuit Court of the United States, for the district of Georgia; after the claim of said sheriff, or prior thereto, if the claim in the said Circuit Court shall be adjudged to have priority of the proceeding in the state Court.

JOHN CLARK, *Governor.*

Documentary evidence was introduced in the Court below, and witnesses were examined, which proved the interest of Madrazo in the Isabelita; the illegality of the capture and condemnation; and which were intended to prove the identity of the negroes, the subject of the proceedings, with those who had been on board the Isabelita.

On the part of Juan Madrazo, it was contended.—

1. That his proprietary interest in the slaves, and the illegality of the capture, and condemnation of the Isabelita and cargo, were fully proved, and that he is entitled to restitution of the property libelled.

2. That the Court below had jurisdiction.

3. That the possession of the property libelled, the service of the monition, and the order of the Circuit Court, and agreement of the governor of Georgia, filed in that Court, fix the parties in possession of the property for it; and that the process of the Court will operate on them individually; and not on the state of Georgia.

On the part of the state of Georgia, it was contended.—

1. That the Court below had no jurisdiction.

2. That there is no sufficient proof of proprietary interest, to entitle Juan Madrazo to restitution of the property libelled.

William Bowen was not represented by counsel, before the Court.

As the decision of the Court was exclusively on the question of jurisdiction, no other than the arguments of counsel on that question are given.

Mr. Berrien, on the part of the state of Georgia.—

1. The Circuit Court of the United States had no jurisdiction in the case, it involving jurisdiction over the state of Georgia.

Jurisdiction cannot be claimed on the ground of consent; it cannot be obtained by the voluntary appearance of the governor of Georgia to the libel of Madrazo, and he had no right to give jurisdiction. The exemption of a state from the jurisdiction of the Courts of the United States, is for the preservation of their sovereignty; it is an attribute of sovereignty, and it is no objection to the exception being taken, that the appearance was voluntary. The governor of Georgia could not yield up this attribute of the sovereignty of the state; his agency being limited by the Constitution. A party may object to the jurisdiction of the Court below, to try a cause which he himself instituted, Capron *vs.* Van Noorden, 2 *Cranch*, 126. This question is therefore to be considered as unaffected by the appearance of the governor of Georgia.

The 11th article of the amendments to the Constitution of the United States, takes away the jurisdiction of the Courts of the Union, in all cases in law and equity, in which claims are

preferred against the separate states; and the amendment was intended to leave to the several states the adjustment of the claims of individuals upon them; Cohens *vs.* State of Virginia, 6 *Wheat.* 264. The judicial power of the Courts of the United States, is, by the amendment, prevented from extending to any *suit*, commenced or prosecuted, &c., against a state. 6 *Wheat.* 264. 407, 408.

The alteration in the Constitution was not made by revoking a power which the Courts possessed; but the amendment declares, that "*the judicial power shall not be construed to extend to suits, &c.;*" and it denies that such a power ever existed.

Why is not a suit in the admiralty a suit at law?

It proceeds according to the law of the country, and in the Courts of the country. The laws which govern and regulate the decisions of the Admiralty Courts, are the laws of the Union.

It is agreed, that, according to the doctrine in Fowler *vs.* Lindsey, 3 *Dall.* 411, the state must be either *nominally*, or *substantially*, a party to the suit. It is not enough, that the suit may, in its result, consequentially affect its interests.

The state of Georgia is a party in the proceedings of Madrazo; a citation is prayed to the state; and the property which the libellant seeks to obtain, by the decree of the District Court, is in the possession of the governor of Georgia, under the authority of a law of the state; another part is in the treasury of Georgia, and has become mingled with the general and public funds of the state. The process of the Court was served on the governor and treasurer of the state; and they are required to show cause, why restitution shall not be decreed. The law of the United States of 1807, prohibits the importation of slaves; and directs, that if slaves are brought in, they shall be seized, and delivered to the governor of the state in which the seizure is made. The governor of Georgia appointed an *agent* to receive them; and the libel states the *slaves claimed, were delivered to the agent of the state.* The right of the state of Georgia, acquired under that Act, is spread on the record by the libellant; and it is this right, so acquired, which he seeks to divest. The state of Georgia is, therefore, a party to this suit, because the *res* is in her possession; and the monition issued below, was served upon the governor and the treasurer of the state.

The jurisdiction is also denied, because a judgment of the Court would operate directly on the state of Georgia. Madrazo should look to the legislature of Georgia for redress; and the appeal to her justice, is not to be made through the Courts of the United States.

The terms of the amendment to the Constitution—its spirit,

and the views heretofore taken of it, by this Court, are all opposed to the construction now claimed, which will except from the operation of the amendment, cases of admiralty jurisdiction. Proceedings in the admiralty, are suits at law. Does the admiralty proceed without law, according to the will of the Judge? The forms of its proceedings are according to the *Civil Law;*—the rights of the parties are decided according to the *law of nations*, and the *law merchant;* and both on its prize and instance side, according to the municipal laws of the country where it sits.

The objections made by the states to their liability, before the amendment to the Constitution, was not to the *mode* by which the suit was instituted; but to the *fact* of their being made answerable to the Courts of the Union.

To restrict the amendment to cases of *Common Law* and *Equity*, would not, therefore, have afforded an adequate remedy to the alleged grievance. Nor was the restriction established with a reservation as to claims, by foreigners; neither was it intended to leave uninfluenced by it, cases which might arise out of a state of war. Many of the suits which had been brought, and which might have been brought, before the amendments, were instituted by foreigners; or were of a nature to be prosecuted in the admiralty. The construction claimed by the opposite counsel, would exhibit the extraordinary fact, that while the amendment took away the jurisdiction of the Supreme Court in suits against states, it left it in the lowest Court under the Constitution.

Nor does the exemption of the states from suits in the admiralty, authorize apprehensions of internal difficulties. In cases of captures at war, on the high seas, by whatever ship of war or armed vessel, acting under the authority of the United States, the capture may be made, no right could be acquired by capture, to the property, by a state; the right to the property, is that of the sovereign who makes the war; and, but for the Prize Act, by which the property captured is condemned and distributed, it would remain the property of the sovereign. Cited, Osborne *vs.* The Bank of the United States, 9 *Wheat.* 157–8; likewise Cohens *vs.* The state of Virginia, 6 *Wheat.* 264.

But if the amendment to the Constitution does not extend to cases of admiralty jurisdiction; the jurisdiction of this case would be in the Supreme Court, and therefore, there is error in these proceedings.

2. The Court below, never had possession of the *res*, or any thing pertaining to it. The warrant of arrest issued in the District Court, was never served. The Court relying on the service of the *monition*, which was erroneous.

(The Governor of Georgia *vs.* Juan Madrazo.)

The *res* remained in the possession of the governor of Georgia, without any agreement for its production.

The proceedings in the District Court, not having been founded upon the *res;* and the service of the monition not having been legal; the Circuit Court could not have jurisdiction on the appeal. As an appellate Court, it could, by no proceeding, get possession of the *res;* and the case should have been remitted by the Circuit to the District Court.

The provisions of the Act of Congress of 1807, which apply to this case, were not repealed by the law of 1818.

The repeal applied to importations by sea, and these slaves were brought into Georgia by land.

Mr. Wilde, for Juan Madrazo, made these points.—

1. That the Court below had jurisdiction.

2. That the proprietary interest of Madrazo, in the Isabelita, and slaves, and the illegal outfit of the Successor, are sufficiently proved; and he is consequently entitled to restitution.

The original grant of jurisdiction, in such cases, to the Courts of the United States, is ample. 2d sect., 3d art. Cons. U. S. The admiralty jurisdiction is, "of all cases of admiralty, a maritime jurisdiction," generally, without restriction; whether they arise under the Constitution, laws, and treaties of the United States, or the law of nations.

The grant of common law and equity jurisdiction, is confined to cases arising under the constitutional laws and treaties of the Union. Before the amendent to the Constitution, the Courts of the United States must have taken cognizance of admiralty cases; although a state were directly interested, or even a party on the record.

Even since the amendment, there are cases in which it is presumed these Courts may take jurisdiction, although a state be a party. The second clause of the tenth section of the second article of the Constitution, prohibits the states from keeping troops, or ships of war, only in time of peace. In time of war, they may. During actual hostilities, there is nothing to prevent a state from fitting out a ship of war, or even a fleet, for defence, or annoyance; and the lawful prizes made by such a fleet, it is presumed, would be the property of the state—a state may exercise this power. Congress have the right to make rules concerning captures. Such rules are the supreme law. But if all captures, made by state cruisers, are to be tried in state tribunals, how long could the rules of Congress concerning captures be enforced; or the belligerent rights of the Union be exerted, without the violation of justice to neutral nations?

To the great powers of war and peace, must be attached

those of making war efficient, and peace secure. Unjust judgments, unredressed, are among the causes of war. But if the state tribunals are to decide in the last resort, upon captures made by their own vessels, where neutral claimants are concerned; the whole may be involved in war, by the misconduct of a part.

This Court will not adopt such a construction of the amendment, unless it is forced upon them, by its terms.

The language must be clear, strong, and peremptory, which coerces its adoption.

The grant distinguishes between common law and equity jurisdiction, and admiralty jurisdiction. They are given by distinct clauses, and to a different extent; and are treated as separate powers. If they are so considered—if the three are separately granted, distinguishing each from the other, and two only are taken away; does not the third remain?

If the District Court were proceeding without jurisdiction, how has it happened, that a prohibition was not moved for? It would lie, in such a case. U. States *vs.* Peters. 3 *Dall.* 121; and an appeal might be taken on the decision. Cohen *vs.* Virginia, 6 *Wheat.* 397. The counsel referred to Publicus, No. 80, and to the debates of the conventions, on adopting the Constitution. But, supposing the amendment extends to, and excludes, admiralty, as well as equity and common law jurisdiction; is this a case, where the state is a party defendant on the record, or in which her rights are directly implicated; and the process of this Court must go against her? In form, the state is not a party—the information and claim, are by John Clark, Governor, in behalf, &c. The proceeding, if state interests are implicated, is not *against* a state, but *by* a state; the state, if a party at all, is the *actor*. In substance, it is a judicial proceeding, at the instance of a state; in which she seeks the aid of the United States' Courts, to give effect to a title claimed in her behalf, under the United States' Laws. In effect, the sentence and process of the Court, will operate not upon the state, but on individuals. Osborne *vs.* The Bank of the United States. 9 *Wheat.* 738, and the United States *vs.* Bright, 3 *Am. Law Journal*, 216.

Has the state of Georgia really any interest in these Africans? The claim set up, is under the Act of Congress of 1807, prohibiting the slave trade; which places Africans illegally imported, at the disposition of the state into which they are brought; and the Act of Georgia of November 1817, ordering them to be sold, unless taken by the Colonization Society, and all expenses since capture and condemnation paid. Before any decree upon this information—before it was even filed, all that part of the Act of 1807, under which Georgia could derive any title, was repealed. Act of 1818. *Ing. Dig.*

(The Governor of Georgia *vs.* Juan Madrazo.)

The title to property forfeited, or liable to forfeiture, is not divested, till it is libelled and condemned; and if there be an appeal, not until sentence of condemnation is rendered in the appellate tribunal. Yeaton *vs.* The United States. 5 *Cr.* 281–3.

If the statute creating the forfeiture, be repealed before final sentence, without reserving the right to punish cases arising under it, condemnation cannot take place, Schooner Rachael *vs.* The United States, 6 *Cra.* 329. The Irresistible, 6 *Wheat.* 551.

Until the condemnation, the state has no right to the Africans.

After condemnation, indeed, the importer's title is divested, by relation, back to the act of forfeiture. But until condemnation, his title is not divested.

The right of the state, depends upon the result of a judicial investigation; which, when a forfeiture is ascertained by final sentence, gives it relation back to the time of the act committed, and from that period divests the importer, and invests the state, with his title. But if pending the proceedings the Act is repealed, the judicial proceeding necessary to give effect to the claim of the state, can have but one result.

That claim must be rejected.

The proposition, that the Courts of the United States have not jurisdiction in such a case, then, comes to this;—an alleged right, in a state, though dependent upon the result of a judicial inquiry, may be set up, to preclude that inquiry, upon the result of which it depends. And that, even though the Court could look into the question, must determine that no right, in fact, exists.

Under this Act, there was no authority to sell the Africans before condemnation; and the money, if in the treasury, is there by the unauthorized act of an individual, and in violation of the law.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

Some time in the year 1817, Juan Madrazo, a Spaniard, residing in the Island of Cuba, engaged in the slave trade, fitted out a vessel for the coast of Africa, which procured a cargo of Africans; and on its return, in the autumn of 1817, was captured by a privateer sail, under the flag of one of the governments of Spanish America, and carried into Amelia Island; where the vessel and cargo were condemned by a tribunal, established by Aury, the authority of which has not been acknowledged in this country. The Africans were purchased by William Bowen, and were conducted into the Creek nation;

within the limits of the state of Georgia, where they were seized by M'Queen M'Intosh, a revenue officer, at Darien, in Georgia, early in January 1818, under the Act of 1807; which prohibits the importation or bringing into the United States, of any negro, mulatto, or person of colour. This Act annuls the title of the importer, or any person, claiming under him, to such negro, mulatto, or person of colour, and declares that such persons "shall remain subject to any regulation, not contravening the provisions of this Act, which the legislatures of the several states or territories, at any time hereafter, may make for disposing of such negro, mulatto, or person of colour."

In December 1817, the legislature of Georgia passed an Act, which empowered the governor to appoint some fit and proper person to proceed to all such ports and places within this state, as have or may have, or may hereafter hold any negroes, mulattoes, or persons of colour, as have been, or may hereafter be seized or condemned under the above recited Act of Congress, and who may be subject to the control of this state; and the person so apppointed shall have full power and authority to receive all such negroes, mulattoes, or persons of colour, and to convey the same to Milledgeville, and place them under the immediate control of the executive of this state.

The second section authorizes the governor to sell such negroes, mulattoes, or persons of colour, in such manner as he may think most advantageous to the state.

The third directs that they may be delivered up to the Colonization Society, on certain conditions therein expressed; provided the application be made before the sale.

Under this Act, the Africans brought in by William Bowen, were delivered up to the governor of Georgia, who sold the greater number of them, and paid the proceeds, amounting to 38,000 dollars, into the treasury of the state. The Colonization Society applied for those remaining unsold, amounting to rather more than twenty, and offered to comply with the conditions prescribed in the Act of December 1817.

In May, 1820, the governor of Georgia filed an information in the District Court of Georgia, stating the violation of the Act of Congress, that the Africans were placed under the immediate control of the executive of the state, where they awaited the decree of the Court. He states the application made on the part of the Colonization Society, with which he is desirous of complying, as soon as he shall be authorized to do so by the decree of the Court.

In November 1820, William Bowen filed his claim to the said Africans, alleging that they were his property—that they

had not been brought into the United States in violation of the Act of Congress; but were seized while passing through the Creek nation, on their way to West Florida.

In February 1821, Juan Madrazo filed his libel, alleging that the Africans were his property—that on the return voyage from Africa, they were captured by the privateer Successor, commanded by an American, and fitted out in an American port—that the vessel and cargo were carried into Amelia Island, and condemned by an unauthorized tribunal; after which they were brought by the purchaser into the Creek nation, where they were seized by an officer of the United States—brought into the limits of the district of Georgia, and delivered over to the government of that state, in pursuance of an Act of the General Assembly, carrying into effect an Act of Congress, in that case made and provided. That a part of the slaves were sold, and the proceeds, amounting to 38,000 dollars, or more, paid into the treasury of the state; and that the residue, amounting to twenty-seven or thirty, remain under the control of the governor.

The libel denies that the laws of the United States have been violated, and prays that admiralty process may issue to take possession of the slaves remaining under the control of the governor of Georgia; and that the governor and all others concerned, should be cited to show cause why the said slaves should not be restored to Juan Madrazo, and the proceeds of those which had been sold, paid over to him.

Upon this libel a monition was issued to the governor of Georgia, who appeared and filed a claim on behalf of the state; in which he says, that the slaves were brought into the state, in violation of the Act of Congress, and that they were taken into the possession of the executive of the state, in pursuance of the Act of the state legislature, enacted to carry the Act of Congress into effect. That a number of the said slaves have been sold, and the proceeds paid into the treasury, where they have become a part of the funds of the state, not subject to his control, or to the control of the treasurer. That the residue of the said slaves, who remain unsold, have been demanded under the law, by the Colonization Society.

Process was also issued against the Africans, but was not executed. The two causes came on together, and the District Court dismissed the claim of Bowen, and also dismissed the libel of Madrazo, and directed that the slaves remaining unsold should be delivered by the marshal to the governor of the state, and that the proceeds of those sold, should remain in the treasury.

Both Bowen and Madrazo appealed to the Circuit Court.

At the hearing in the Circuit Court, the sentence, dismissing

the claim of Bowen, was affirmed. That dismissing the libel of Madrazo was reversed, and a decree was made, that the slaves remaining unsold, should be delivered to him; on his giving security to transport them out of the United States—and farther, that the proceeds of those which were sold, should be paid to him. From this decree, the governor of Georgia and William Bowen have appealed to this Court.

A question, preliminarily to the examination of the title to the Africans, which were the subject of these suits, and to the proceeds of those which were sold, has been made by the counsel for the state of Georgia. He contends, that this is essentially, and in form, a suit against the state of Georgia; and therefore was not cognizable in the District Court of the United States.

The process which issued from the Court of Admiralty not having been executed, the *res* was never in possession of that Court. The libel of Madrazo therefore, was not a proceeding against the thing, but a proceeding against the person for the thing. This appeal carried the cause into the Circuit Court, as it existed in the District Court, when the decree was pronounced. It was a libel, demanding, personally, from the governor of Georgia, the Africans remaining unsold, and the proceeds of those that were sold, which proceeds had been paid into the treasury.

Pending this appeal, the governor filed a paper in the nature of a stipulation, consenting to hold the Africans claimed by the libel of Madrazo, subject to the decree of the Circuit Court; if it should be determined that the claim in the Circuit Court had priority to sundry executions, levied on them by the sheriff of Baldwin county. Had this paper been filed in the District Court, it would have been a substitute for the Africans themselves, and would, according to the course of the admiralty, have enabled that Court to proceed in like manner as if its process had been served upon them. The libel would then have been *in rem*. Could this paper, when filed in the Circuit Court, produce the same effect on the cause?

We think it could not.

The paper in nature of a stipulation, is a mere substitute for the process of the Court; and cannot, we think, be resorted to, where the process itself could not be issued according to law. The process could not issue legally in this case, because it would be the exercise of original jurisdiction in admiralty; which the Circuit Court does not possess.

This cause therefore remained in its character a libel against the person of the governor of Georgia, for the Africans in his possession as governor, and for the proceeds, in the treasury, of

those which had been sold. Could the District Court exercise jurisdiction in such a cause?

Previous to the adoption of the 11th amendment to the Constitution, it was determined that the judicial power of the United States, extended to a case in which a state was a party defendant. This principle was settled in the case of Chisholm *vs.* Georgia. 2 *Dal.* 419. In that case, the state appears to have been nominally a party on the record. In the case of Hollingsworth *vs.* Virginia, also, in 3 *Dal.* 378, the state was nominally a party on the record. In the case of Georgia *vs.* Brailsford, 2 *Dal.* 402, the bill was filed by his excellency Edward Telfair, Esq. Governor and Commander in Chief, in and over the state of Georgia, in behalf of the said state. No objection was made to the jurisdiction of the Court, and the case was considered as one in which the Supreme Court had original jurisdiction, because a state was a party. In the case of New York *vs.* Connecticut, 4 *Dal.* 3, both the states were nominally parties on the record. No question was raised in any of the cases respecting the style in which a state should sue or be sued; and the presumption is that the actions were admitted to be properly brought. In the case of Georgia *vs.* Brailsford, the action is not in the name of the state, but it is brought by its chief magistrate in behalf of the state. The bill itself avows, that the state is the actor, by its governor.

There is, however, no case in which a state has been sued without making it nominally a defendant.

Fowler et al. *vs.* Lindsey et al. 3 *Dal.* 411, was a case in which an attempt was made to restrain proceedings in a cause depending in a Circuit Court; on the allegation that a controversy respecting soil and jurisdiction of two states, had occurred in it.

The Court determined that a state, not being a party on the record, nor directly interested, the Circuit Court ought to proceed in it. In the United States *vs.* Peters, the Court laid down the principle, that although the claims of a state may be ultimately affected by the decision of a cause, yet if the state be not necessarily a defendant, the Courts of the United States are bound to exercise jurisdiction.

In the case of Osbourne *vs.* the Bank of the United States, 9 *Wheat.* 738, this question was brought more directly before the Court. It was argued with equal zeal and talent, and decided on great deliberation. In that case, the auditor and treasurer of the state were defendants, and the title of the state itself to the subject in contest was asserted. In that case, the Court said, "It may, we think, be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record." The Court added,

"the state not being a party on the record, and the Court having jurisdiction over those who are parties on the record, the true question is not one of jurisdiction, but whether, in the exercise of its jurisdiction, the Court ought to make a decree against the defendants; whether they are to be considered as having a real interest, or as being only nominal parties."

The information of the governor of Georgia professes to be filed on behalf of the state, and is in the language of the bill, filed by the governor of Georgia on behalf of the state, against Brailsford.

If, therefore, the state was properly considered as a party in that case, it may be considered as a party in this.

The libel of Madrazo, alleges that the slaves which he claims, "were delivered over to the government of the state of Georgia, pursuant to an Act of the General Assembly of the said state, carrying into effect an Act of Congress of the United States, in that case made and provided; a part of the said slaves sold, as permitted by said Act of Congress, and as directed by an Act of the General Assembly of the said state; and the proceeds paid into the treasury of the said state, amounting to thirty-eight thousand dollars, or more."

The governor appears, and files a claim on behalf of the state, to the slaves remaining unsold, and to the proceeds of those which are sold. He states the slaves to be in possession of the executive, under the Act of the Legislature of Georgia, made to give effect to the Act of Congress on the subject of negroes, mulattoes or people of colour, brought illegally into the United States; and the proceeds of those unsold to have been paid in the treasury, and to be no longer under his control.

The case made, in both the libel and claim, exhibits a demand for money actually in the treasury of the state, mixed up with its general funds, and for slaves in possession of the government. It is not alleged, nor is it the fact, that this money has been brought into the treasury, or these Africans into the possession of the executive, by any violation of an Act of Congress. The possession has been acquired, by means which it was lawful to employ.

The claim upon the governor, is as a governor; he is sued, not by his name, but by his title. The demand made upon him, is not made personally, but officially.

The decree is pronounced not against the person, but the officer, and appeared to have been pronounced against the successor of the original defendant; as the appeal bond was executed by a different governor from him who filed the information. In such a case, where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, we think the

state itself may be considered as a party on the record. If the state is not a party, there is no party against whom a decree can be made. No person in his natural capacity is brought before the Court as defendant. This not being a proceeding against the thing, but against the person, a person capable of appearing as defendant, against whom a decree can be pronounced, must be a party to the cause before a decree can be regularly pronounced.

But were it to be admitted, that the governor could be considered as a defendant in his personal character, no case is made which justifies a decree against him personally. He has acted in obedience to a law of the state, made for the purpose of giving effect to an Act of Congress; and has done nothing in violation of any law of the United States.

The decree is not to be considered as made in a case in which the governor was a defendant, in his personal character; nor could a decree against him, in that character, be supported.

The decree cannot be sustained as against the state, because, if the 11th amendment to the Constitution, does not extend to proceedings in admiralty, it was a case for the original jurisdiction of the Supreme Court. It cannot be sustained as a suit, prosecuted not against the state but against the thing; because the thing was not in possession of the District Court.

We are therefore of opinion, that there is error in so much of the decree of the Circuit Court, as directs that the said slaves libelled by Juan Madrazo, and the issue of the females now in the custody of the government of the state of Georgia, or the agent or agents of the said state, be restored to the said Madrazo, as the legal proprietor thereof, and that the proceeds of those slaves, who were sold by order of the governor or the said state, be paid to the said Juan Madrazo; and that the same ought to be reversed; but that there is no error in so much of the said decree as dismisses the information of the governor of Georgia, and the claim of William Bowen.

Mr. Justice JOHNSON, *dissentiente.*—

By the new and unexpected aspect which this cause has assumed, in this Court, I feel myself called upon to accompany the report of this decision with a brief explanation. Such an explanation appears necessary, not less in vindication of the course pursued by the state of Georgia, than of the judicial course of the Circuit Court, over which I have the honour to preside.

By the state of facts, as now exhibited, it would appear as if the Court of the sixth circuit of the district of Georgia, had been taking very undue liberties, both with the executive and treasury departments of that state; and that two of the gover-

nors of that state, acting in behalf of the state, had first come voluntarily into the Courts of the United States, and then, only because the decision of that Court was against the rights they asserted, repudiated their own act, and denied the jurisdiction of the very Court which they had voluntarily called to decide on their rights.

Yet nothing can be farther from the truth of the case. The real exposition of the incidents to the cause, lies in this;—that the actual *promovent contestatio litis*, was the colonizing society; —that Georgia, at least, in its inception, had no interest in it; —that the governor only regarded himself as a stake holder, to the three disputants who claimed the property. The slaves, as well as the proceeds of those which were sold, it is notorious, have, in fact, been delivered up by the state to one of these claimants.

It is true, that in this point, the legislature of the state has differed in opinion on the question of right, from the Court that tried the cause, and surrendered them to Bowen, instead of Madrazo; but this fact proves, that she was not contending for herself.

There is no necessity, however, for speaking out of the record on this subject. The information, as well as the claim, filed to Madrazo's libel, both explicitly avow, that, as to the slaves remaining unsold, the governor was acting in behalf of the colonizing society; and had not the decision below been against their claim, and on grounds which cannot be shaken, it is fair to conjecture, that the exception here taken to the jurisdiction, would never have been suggested; nor had that society possessed a legal existence, so as to prosecute a suit, in its own name, is there the least reason to believe, that the governor of Georgia would ever have presented himself, in the Courts of the United States, upon this subject.

What could he do? This property had come legally into the hands of his predecessor—a part had been sold—and the rest transmitted to him, specifically. Two parties presented themselves, claiming it in their respective rights; and having been constituted by law, the guardian of the rights of one; he presents himself to the only Court that could take cognizance of the cause, in order to have the question of right decided, before he would surrender the slaves, in his possession, to either claimant. The money raised from the sales, he disavows having any control over.

But, in the progress of the cause, incidents occur which produce a total change in the views and interests of parties. A third party arises, and, on the clearest proofs and best established principles, has made out the proprietary interest to be in himself. An appeal is taken to this Court; and pending the ap-

peal, the party who had failed in every Court below, and must fail, wherever the rights are subjected to judicial cognizance, succeeds in prevailing on the legislature to abandon the property to him.

Thus, then, the colonizing society have lost all hopes from a suit at law; Bowen has obtained the property; the legislature that gave it to him, can, at least, feel no desire to have Madrazo's rights confirmed in this Court; and all became interested in overturning their own work, and crushing Madrazo's interest under the ruins.

It is certainly a purpose which cannot be willingly favoured in a Court of justice; and I meet it, with the most thorough conviction that the law is not with the appellants, on the objections to the jurisdiction of the Court below, which have now, here, for the first time, been moved and argued.

There are two exceptions taken to the exercise of jurisdiction, in the Court below:—

1. That a state was a party, &c.

2. That the jurisdiction of the District Court never attached, because the *res subjecta*, was never actually in possession of that Court.

The facts were these,—the negroes were certainly brought into the United States, in contravention of the Act of Congress of 1807. That Act creates a forfeiture, inasmuch as it divests the owner of all property in the slaves so brought in; and by another provision, it is left to the states to dispose of such persons of colour, in any manner they may think proper, not contravening the provisions of that Act. The state of Georgia, by law, authorized their governor to appoint an agent to receive such persons of colour, and deliver them to the executive, to be sold, unless applied for, by the colonizing society; and if so applied for, then to be delivered into their possession.

These slaves were seized by a revenue officer of the United States, and voluntarily delivered to governor Rabun, then governor of Georgia; who had sold all, except about thirty, before the society applied to him, agreeably to the provisions of the Act.

The Georgia law contains no express instructions to the governor, how to dispose of the proceeds of the sales. It authorizes him to sell, after sixty days notice, "in such manner as he may think best calculated for the interest of the state;" but whether for cash, or credit, or to remain in, or be shipped from, the state, be meant by this provision, there are no means of determining. The money was, in this instance, paid into the treasury; or, at least, so the governor alleges, in his claim

to the Madrazo libel; and so we are bound to consider the facts.

Here, then, was a case of forfeiture, under a law of Congress; and the governor of the state legally authorized to sue for, and recover, the thing forfeited, and "*when seized and condemned,*" as the Georgia law expresses it, to sell it on one state of facts; on another, to deliver it to the colonizing society. Who was to sue for this forfeiture; if not the state, or the governor, as its representative? The society could not, for it had no existence in law.

The governor accordingly sold the greater part; and his successor filed an information in the District Court of the United States, to have the residue condemned, that he might deliver them to that society. To this libel and information, Bowen filed his claim and answer; and, while that suit was pending, Madrazo filed his libel in the District Court, praying process against the Africans remaining in the governor's hands, and the proceeds of those which were sold. On this libel a warrant of arrest was issued against the slaves, and a monition to the governor and all concerned, in relation to the whole subject of Madrazo's claim.

The warrant of arrest was not served in the District Court; but governor Clarke, successor of governor Rabun, appeared to the monition, *without protest*, and filed a claim to the Africans, in behalf of the society; as to the proceeds of those which had been sold, he simply answers, that they had been paid into the treasury, where they remained mixed up with the treasure of the state, and beyond his control.

The pleadings were in this state, when the district Judge entered upon a plenary hearing of the case, taking into view the information of the governor with Bowen's claim, and the libel of Madrazo with the governor's claim and answer; and thereupon sustained the information, and dismissed Bowen's claim and Madrazo's libel.

Bowen and Madrazo appealed; and, on the hearing in the Circuit Court, where a body of new evidence was introduced; the decree of the District Court was reversed, and the information and Bowen's claim dismissed.

But having proceeded so far, the Circuit Court found itself thus situated.

As the District Court had sustained the information, it would have been nugatory to enforce its warrant of arrest upon the slaves, since they were already in possession of the state. Madrazo's libel being dismissed in that Court, no further steps were taken, to render the *res subjecta*, into actual possession.

But, when the information was dismissed, and Madrazo's

libel sustained in the Circuit Court, it followed, that it was error in the District Court, not to have enforced the service of the warrant of arrest on the slaves, or done some equivalent act. Thus situated, the Circuit Court could not send back the cause; because, by the 24th section of the Judiciary Act of 1789, the Circuit Court is required to go on and make such decree, as this District Court ought to have made. That Court thought that the obligation to perform this duty, carried with it all the incidents necessary to perform it, and ordered process accordingly. To this, the governor again, without protest, responded, by voluntarily entering into a stipulation to hold the slaves, subject to the order of that Court; and then the Court, considering itself legally in possession of the *res*, made the decree in favour of Madrazo, which is here brought up for revision.

On the question of right, upon the evidence before the Circuit Court, there can scarcely be two opinions. The cargo was Madrazo's—it was captured by a privateer—fitted out in Baltimore—run into Fernandina—there sold to Bowen—carried across the country to the Creek agency, within the limits of the United States, and where its jurisdiction attached, notwithstanding the Indian title existed—and, although Bowen, the tortiou sowner, committed an offence by introducing them into the country; Madrazo was not privy to that offence, and was innocent of any act that could work a forfeiture of his interest.

But the question now to be considered, is exclusively that of jurisdiction; and it is insisted, first, that as the state was a party, and the party defendant in both cases, in the Circuit Court, that Court could not maintain jurisdiction of the subject.

That a state is not now suable by an individual, is a question on which the Court below could not have paused a moment.

The 11th amendment to the Constitution, put that question at rest for ever. But where is the provision of the Constitution, which disables a state from suing in the Courts of the Union?

The second section of the third article, extends the judicial power of the United States, to all cases arising under the Law of the United States, and to all cases of admiralty and maritime jurisdiction; to controversies between two or more states, between a state and citizens of another state—and between a state, or the citizens thereof, and foreign states, citizens, or subjects.

It is true, the next section provides, that, in all cases in which a state shall be a party, the Supreme Court shall have

original jurisdiction. But, it is obvious, that original, does not mean exclusive; and, in the 13th section of the Judicial Act, of 1789, it is so treated; since the legislature there declares, in what instances the jurisdiction of the Supreme Court shall be exclusive, and in what concurrent, when a state is a party. The words of that section are: "The Supreme Court shall have exclusive jurisdiction of all controversies of a *civil nature*, where a state is a party, *except between a state and its citizens*; and except also between a state, and citizens of other states, and aliens; in which latter case, it shall have original, but not exclusive jurisdiction."

Now, considering this section in connexion with the Constitution, it is obvious, that the word exclusive, there used, must be considered as applying solely to the Courts of the United States; since it never could have been imagined, that the states were to be restricted from suing in their own Courts, or those of their sister states; and thus construed, it must carry the implication, that the states may sue in any other Courts of the United States, in cases comprised within the jurisdiction vested in those Courts, by the Judiciary Act; provided, the cause of action, or the parties, be such as bring the suit within the cases to which the judicial power of the United States is extended, by the Constitution.

In a suit against an alien, then, there can be no question, that a state may sue in the Circuit Court; and must prosecute a suit there, if the alien chooses to assert the right of transfer secured to him, under the 12th section of that Act.

And so, with regard to suits against consuls, and vice-consuls, it is perfectly clear, that the suit of a state must, if the defendant insists upon his right, be prosecuted in the District Courts of the United States.

The 9th section of the Act, being that which prescribes the jurisdiction of the District Courts, is explicit on this point. But that section embraces other cases, in which, without any strained construction, the states may assert the rights of a suitor, in the District Court.

The words of the section are: "The District Courts shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under Laws of Impost, Navigation, and Trade of the United States, where seizures are made on waters, &c.; and shall also have exclusive original cognizance of all seizures on land, &c.; and of all suits for penalties, and forfeitures, incurred under the Laws of the United States."

Now, it is very clear, that wherever the District Court is vested with "exclusive original cognizance," the Supreme Court can possess no original jurisdiction; and such is clearly the case,

with regard to seizures, and suits for forfeitures, under the Laws of the United States, and suits in the admiralty. And, unless some reason can be shown, why a state should not prosecute a suit for a forfeiture, under the Laws of the United States; it follows, with regard to the information, that the jurisdiction was rightfully exercised by the District Court, in the present instance. The admiralty suit shall be separately considered. But why may not a state prosecute a suit for a forfeiture, under a law of the United States? Take the cases of a law of Congress passed to aid the states, in the collection of a tonnage duty; or of a penalty, under their inspection laws. In the one case, there may be a seizure on the water, and in the other, on the land: in either, there may be a suit for a forfeiture; and in all, the penalty, might, very rationally, be given to the state, or its prosecuting officer. The present, so far as it involves the question on the information, is precisely one of those cases. Here was a forfeiture, incurred under a law of the United States; and the benefit of it, was consigned to the states, if they chose to accept it. Here the state did accept it, and authorized their executive to assert the rights derived under the Law of Congress.

An examination of the exceptions in the thirteenth section of the Act, which marks out the jurisdiction of the Supreme Court, will throw light upon this subject.

The language of the section is: "That the Supreme Court shall have exclusive jurisdiction of all controversies of a civil nature, where a state is a party, except between a state *and its citizens;* and except also, between a state and citizens of other states, or aliens; in which latter case, it shall have original, but not exclusive jurisdiction."

Now, it may seem unaccountable, at first view, why these exceptions should have been extended to controversies between a state and its own citizens; since controversies between a state and its own citizens, is not one of the subjects of jurisdiction enumerated in the Constitution. And the solution is to be found in this, that the grant of jurisdiction, as to cases arising under the Constitution, Laws, &c. of the United States, and of admiralty and maritime causes, is not restricted to, or limited by any relation, or description of persons. Controversies, in these branches of jurisdiction, may, therefore, by possibility, arise between a state and its own citizens; certainly between a state and the citizens of other states, or aliens, under the laws of the Union, or in admiralty and maritime cases.

As the law regards this information as a civil suit, *in rem*, on the exchequer side of the admiralty, and it was grounded on a law of Congress—the citizenship of the claimants, can have no influence on the question of jurisdiction. I think,

however, that it appears somewhere in this voluminous record, that Bowen was a citizen of Georgia; but whether of that state, a sister state, or a foreign state, the controversy, if it be regarded as one with individuals, is expressly excepted from the exclusive jurisdiction of the Supreme Court; and, I must think, is within the original jurisdiction of the District Court. And if so, it follows, that the state must, upon appeal from a decision there made in its favour, assume the attitude of a defendant in any Court, into which the cause may be legally carried, by appeal or writ of error.

In England, the king cannot be sued, yet he is daily brought before the Appellate Courts, as a defendant in error. It has long since been decided that this is legal. And thus, too, the United States continually appears upon the docket of this Court, as a party defendant; and, for the same reason, although not suable originally, yet upon a judgment obtained, injunctions have been granted against parties who could not otherwise have been made defendants: as, for example, the United States.

The thing is unavoidable—it is incident to the right of appeal. Justice could not be administered without it. There would be no reciprocity—the law would operate unequally, and to the prejudice of the citizen.

There is no compulsory process used to produce this reversed, I may say, nominal, state of parties. The cause is removed by a citation, or other less offensive process, and the party appears in the Superior Court, if he will—if not, the cause is disposed of without an appearance.

So much for the information, and the appeal from the District Court upon it. We will now consider the rights of the state, in the relation in which it stood to Madrazo's libel. I am considering the state, and not the officers of the state, as the real party to the record.

When Madrazo's libel was filed, the governor's information was pending; and as Madrazo's libel sets out the seizure and delivery of the slaves to the executive of Georgia, and the claims advanced to the proprietary interest therein; it was properly considered in the District Court, in connexion with the information, and in the double aspect of a claim and libel. In the case of the Antelope, the cross libel of the Portuguese was treated, reciprocally, as claim and libel. Considered in the relation of a claim to the information, it is impossible to deny, that if the state rightly preferred the information, it must have been bound by the decisions, both of the District Court, and of the tribunal to which an appeal lay from the decision of the District Court upon that information, as regarded the rights of the claimants.

And if we consider Madrazo's libel in the aspect of a suit in the admiralty, it appears to me impossible to assign a sufficient reason why the state should not be equally bound.

The property or possession of the state had been acquired under a capture at sea—a maritime *tort*. It was therefore clearly a case of admiralty jurisdiction. Where then is the limit to this branch of the jurisdiction of the District Court? No personal relation, description, or character, imposes any such limit. The grant of jurisdiction to the United States, and by the United States to the District Court, is without restriction—and it would be singular, if a state should be precluded from the right of appearing to assert its rights before that tribunal. Suppose the case of a capture of a library shipped to state, and a re-capture and libel for salvage; surely, in some form or other, the state must have a hearing. There is nothing compulsory upon the state—the right may be abandoned, if it will; but, after preferring a claim, will it be contended, that it may withdraw itself from the contest, under an assertion of state immunities, to the prejudice of individual right? This is not a new question in the admiralty—it is considered by Godolphin, who observes "that for the same party in the same cause to surmise and move for a prohibition against that jurisdiction, to which himself had formerly submitted, and in a cause which, by the libel, appears not other than maritime, seems quite beside the rule and practice of the law." *(Jurisd. of the Adm. p.* 116, 117,) and the two adjudged cases of Jennings and Audley, *(Brow. Rep.* p. 2. p. 30,) and Baxter and Hopes, *(Ibid.)* which he cites, do fully establish "that in all cases where the defendant admits the jurisdiction of the Admiralty Court, by pleading, then prohibition shall not be granted, if it do not appear that the act was done out of the jurisdiction."

Now, in this case, the state appeared, and claimed to the monition, without protest. In the admiralty a claimant is an actor—and had the decision of the District Court been affirmed, the state would have had the full benefit of this interposition, as a party. And again, at a subsequent period, the state voluntarily surrendered the *res* to the Circuit Court, and took it out again on stipulation, &c., and had not this exception now been taken, would have had all the benefit of a decree of restoration, if made by this Court. But it is insisted that consent cannot give jurisdiction—that this is a sound rule, and as applied to the Common Law Courts, cannot be controverted. But is it so in the admiralty?

It must be recollected, that the Common Law Courts have themselves released this rule, in relation to the admiralty. I allude to the controversy on the subject of the stipulation bonds, which was finally abandoned, on the ground of the assent

of the party, stipulating to submit to the jurisdiction of that Court. These decisions seem fully in point, to the present case. (2*Br. C. & A.* 97, 98.)

But in the proceedings, in *rem*, the admiralty wants no consent or concession to enlarge its jurisdiction. All the world are parties to such a suit, and bound by it, by the common consent of the world. The interest of a state, or the United States, in the *res subjecta*, must be affected by such a decision. The question will now be considered, whether the want of an actual reduction of the *res* into possession in the District Court, deprived that Court of jurisdiction; or whether if it did, that circumstance would affect the appellate jurisdiction of the Circuit Court. Also, whether on the reduction of the *res* into possession, there was any assumption of original jurisdiction in the Circuit Court?

On these points I cannot bring myself to feel a doubt, since the very failure in the District Court to grant process for reducing the *res* into possession, would be such a "*damnum irreparabile*" as would sustain an appeal to the Circuit Court. Otherwise, the very ground of appeal—that which gives jurisdiction, would take it away. And what, upon an appeal, would be the course of the Circuit Court, upon such a case? It has no power to remand the cause; for the 24th section requires, that "when a judgment or decree shall be reversed in a Circuit Court, such Court shall proceed to render such judgment, or pass such decree, as the District Court should have rendered or passed." This section, I must believe, necessarily, substitutes the Circuit for the District Court, upon a reversal; and vests it with power to do whatever that Court could have done, or ought to have done, originally. It is very important here to notice, that not reducing the *res* into possession in the District Court, was the necessary consequence of its first error, in sustaining the information, and dismissing Madrazo's libel. For if Madrazo's pretensions were to be considered as rejected, there could be no reason for pursuing the means of reducing the *res* into possession in the District Court—and while the cause was in the Circuit Court, that necessity did not arise, for the same reason, until the decree was passed for reversing the decree of the District Court, and dismissing the information. Thus circumstanced, the power given, and duty imposed, by the 24th section, could not have been exercised otherwise than it was. The Circuit Court, alone, could proceed to do justice between the parties, and become *quo ad hoc*, vested with original powers.

The question, as it regards the proceeds of the Africans sold, is one of more nicety. For the proprietary interest in the negroes unsold, could well be disposed of, after the Court

became actually possessed of them. The Court was not at liberty to doubt, that the stipulation would have returned the slaves, specifically, upon monition. But the proceeds of those sold, we must suppose had been paid into the treasury; and there is no doubt, that the Court could not, and would not, have attempted, by compulsory process, to get at it. Yet, was this a sufficient reason for not proceeding to adjudicate upon the question of right? I think not.

It must be noticed here, that the head of the government had omitted no firm or legal means, to give authenticity to the submission of the state to the jurisdiction of the Court. The letters of procuration, executed by both governor Clarke, and his successor, governor Troup, in due form, are on the files; expressly authorizing, in the name of the state, all the acts of certain proctors of that Court, in the name and behalf of the state.

The governor's answer, then, was the answer of the state; and when the answer avows, that many of the slaves were sold, and the money paid into the treasury, what is it, but acknowledging that the property of Madrazo no longer remains in specific existence, but has been sold, and appropriated by the respondent under such circumstances as convert Madrazo's rights into a pecuniary demand, a debt due by the state? Now, the state could stand in no other relation to Madrazo, in this behalf, than Bowen or the captor would have stood, had the sale been made by them; and can it be supposed, that a similar answer, from either Bowen or the captor, would have deprived the Court below of its jurisdiction?

It is almost a work of supererogation, to resort to precedents on such a question; but if necessary, there is no want of precedents, to prove, that the District Court was bound to go on, and render justice to the libellant, according to the forms of the admiralty, as far as it could proceed.

The case of Monro *vs.* Almedia, decided in this Court in 1825, was just such a case, (10 *Wheat.* 473.) There it was fully considered, whether the Court might go on, and how to proceed, and the cause was remanded to the Circuit Court, for further proceedings. The libel charged a seizure and appropriation of a sum of money, on the ocean; and the respondent appeared, under protest, and, by demurring, admitted as true, what the answer here avows to be true.

And strongly analogous is the case of M'Kenzie *vs.* Livingston & Welsh, reported in a note to the 3*d Term Rep.* 333, in the case of Stuart *vs.* Wolf; in which M'Kenzie preferred a libel in the Vice-Admiralty Court, in Jamaica, to obtain condemnation of a sum of money, captured by him, and not paid into the registry of the Court. Livingston and Welsh filed a claim, and that Court decreed to them "*the sum of* 1300 *pounds*,

in the possession of the captor. M'Kenzie appealed to the Lords Commissioners, who affirmed the decree below, and the cause was remitted for further proceedings.

In that case, the *res* was avowedly out of possession of the Court; and yet, upon the submission of the party who held it, the Court entertained jurisdiction, and decreed upon the cause; as if the claimant had been libellant, and the libellant stood in his place.

When money is the thing in contest, or the thing captured has been converted into money, it becomes essentially a debt; and, of course, a metaphysical thing—not to be arrested specifically.

Upon this view of the subject, the District Court might have exercised jurisdiction over the whole capture; and did entertain jurisdiction, in the very act of dismissing the libel, upon the question of right. Then, when the whole cause was brought, by appeal, before the Circuit Court, I hold that the Circuit Court was bound to go as far as it could go, without intrenching upon the sovereign rights of the state; which, for the purposes of justice, had thus consented to enter into the litigation between these parties;—that is, as far as a decree.

Had not the progress of the Court been arrested by this appeal, it could certainly have gone no farther than to issue its monition. But, it cannot be doubted, that, upon Madrazo's petitioning the legislature on the subject, their officers would have been instructed to dispose of the property and money, according to the decree of the Court. Subsequent events, however, have given a new aspect to things; and Madrazo, with abundant proofs of his rights, is left without remedy.

Decree.—These causes came on, &c., on consideration whereof, This Court is of opinion, that there is error in so much of the decree of the said Circuit Court, as directs restitution of the slaves libelled by Juan Madrazo, and the issue of the females, in the custody of the government of the state of Georgia, or the agent, or agents, of the said state, and that the proceeds of those slaves, who were sold by order of the government of the said state, be paid to the said Juan Madrazo; the Circuit Court not having jurisdiction of a cause, in which the plaintiff asserts a claim upon the state; and that the same ought to be reversed and annulled; and the libel of the said Juan Madrazo is ordered to be dismissed. And this Court is further of opinion, that there is no error in the residue of the said decree, and the same is hereby affirmed; and it is further considered and ordered, that the said cause be remanded to the said Circuit Court, with directions for further proceedings, to be had thereon, according to law and justice, in conformity to this opinion.

JOSEPH MANDEVILLE, ONE OF THE FIRM OF RICHARD SLADE & CO., PLAINTIFF IN ERROR, *vs.* GEORGE HOLEY AND THOMAS SUCKLEY, JOINT MERCHANTS IN TRADE, UNDER THE FIRM OF HOLEY & SUCKLEY, DEFENDANTS IN ERROR.

Under the law of Virginia, a confession of judgment by the defendant, is a release of errors.

ERROR to the Circuit Court for the county of Alexandria.

An action was instituted in the Circuit Court for the district of Columbia, by the defendants in error, against Richard Slade, James Anderson, and the plaintiff in error, trading under the firm of Richard Slade & Co.; and the suit having abated, as to Slade, by his death, and by return, as to Anderson, it was prosecuted against Joseph Mandeville only.

The declaration contained the usual money counts, and the damages were laid at ten thousand five hundred dollars.

By consent of parties, an order was made by the Court, referring the accounts to the Auditor of the Court, to state and report them to the Court; this report to be subject to exceptions; and when the report should be settled, then the same to be substituted for a trial by jury, and a judgment to be entered for the whole sum, which should be finally ascertained by the Court to be due.

The Auditor reported a balance of 2403*l.* 2*s.* 6*d.*, of which 1860*l.* 6*s.* 7*d.* *was principal*, to be due to the plaintiff below; which, with the exchange, amounted to eleven thousand six hundred and ninety-five dollars and twenty cents, deducting the interest included in the balance reported by the Auditor; the principal of the debt found to be due, was less than the damages laid in the declaration.

No exceptions having been filed, Mandeville, the plaintiff in error; at a term subsequent to the report, came in, and confessed a judgment for the sum reported, with interest, from the 7th of December 1824.

Mr. Swann, for plaintiff in error.

Mr. Taylor, for defendants in error.

Mr. Swann.—The writ issued in a case, is no part of the record, unless oyer of it is craved; and the confession of judgment goes to the declaration, in which, the damages claimed, are stated to be 10,500 dollars. Upon the confession of judgment for 11,695 dollars 20 cents, the Court gave a judgment which was erroneous, as to this sum, beyond the amount claimed in the declaration. The law of Virginia, which authorizes a jury to give damages, as the principal of the debt, to the amount laid in the declaration, and to allow interest from a preceding peri-

(Mandeville vs. Suckley et al.)

od, making the whole amount of the verdict greater than the damages in the declaration; does not apply in this case, as the debt is a sterling debt.

If this judgment is sustained, the plaintiff in error will be compelled to pay interest upon interest, as both principal and interest are included in the sum allowed by the Auditor. The verdict of a jury, giving the principal and interest from a particular day, on the same, would have had a different effect.

Mr. Taylor, for defendants in error.—

The Court should allow the defendants damages upon the amount of the judgment, as the plaintiff in error was not justified in thus proceeding against his own confession of judgment, and its whole purpose was delay. The form of the confession of judgment is such as is usual; and it is the same form of judgment, as upon the verdict of a jury. The law of Virginia authorizes a jury to give damages, which may, in the whole amount, exceed the damages laid in the declaration. The interest being stated to commence at a period anterior to the day of trial, a party may come in, and agree to enlarge damages. By the Act of Assembly, in Virginia, in 1792, a judgment by confession is equivalent to a release of errors.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

The Court are satisfied in this case, that under the law of Virginia, a confession of judgment by the plaintiff in error, in the original suit, is a release of errors.

Judgment affirmed, with costs and damages, at the rate of six per centum per annum.

JAMES GREENLEAF, APPELLANT, *vs.* NICHOLAS L. QUEEN, AND ELEANOR HIS WIFE, HEIRS, AND RICHARD WALLACK, ADMINISTRATOR, OF WASHINGTON BOYD, DECEASED, APPELLEES.

Where, by the terms of a deed, conveying real estate in trust, to be sold for the benefit of the creditor of the grantor, the trustee is directed to sell the property conveyed, *by public auction*—the trustee was bound to conform to this mode of sale. This was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other; although, by doing so, he might, in reality, promote the interests of those for whom he acted. {145}

When property conveyed in trust, to be sold at public auction, had been sold by private contract, and the property was afterwards offered for sale, in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time, more was bid for the same, than the amount for which it had been privately contracted to be sold; the purchaser, by private contract, to whom possession was delivered, at the price agreed on, cannot allege that the sale was void; since, whatever may be the liability of the *cestuy que trust*, to those interested in the proceeds of the sale, for the amount offered at the auction: it is not an objection, on the part of the purchaser, to release him from his contract. {146}

Where the vendee of real estate, had purchased it, subject to the dower of the widow—of which dower, he might have been informed, if he had used proper diligence, a Court of Equity will not interfere, to release the vendee; but will leave him to such legal remedy, as he may be entitled to, in case his title should, at any future time, be disturbed. {147}

Where a bill had been filed against a trustee, of real estate, and, after his death, administration had been granted to A; who, on the petition of creditors, interested in the trust, was also appointed by the Court, the substituted trustee; and the Court went on to decree, that A, *as trustee*, should execute certain conveyances; the decree was held to be invalid; the course of proceeding, being rather to make the decree against A, in the character of administrator, because he claimed, as administrator, under a title derived from the original trustee, and was the person designated by law, to represent him; or that a supplemental bill, in the nature of a bill of revivor, should have been filed against the substituted trustee; in which all the proceedings should have been stated, and he required to answer the charges contained in the original and supplemental bill. {148}

A decree of a Court of Chancery, is erroneous, which, after ordering certain acts to be done, to enable a party to execute certain duties assigned to him, dismisses the bill, as it puts the cause out of Court, and renders the decree ineffectual: and it is no answer to this objection, that it appears by the record, in the case, that the acts ordered to be done, have been performed; since the error is in the decree itself, and not in its execution. {148}

A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay, in doing so; but this must be done, on demurrer, plea, or answer, pointing out the person or persons, whom, the defendant insists, ought to be made parties. {149}

(Greenleaf vs. Queen et al.)

When a debtor had conveyed to a trustee, real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the Court, upon the application of the creditors, to execute the trust; in a proceeding, relative to the execution of the trust, and the conveyance of the estate, it is necessary that the heirs at law, of the first trustee, shall be parties to the same; as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs. {149}

APPEAL from the Circuit Court of the county of Washington; the appellant having been complainant, in a bill in equity, filed 31st December 1819, in the Court below, against Washington Boyd, trustee of Charles Minifie.

The objects of the bill, were to make void a contract made by the appellant, for the purchase of certain lots of ground, in the city of Washington, being the estate held in trust, for the creditors of Charles Minifie—that certain collateral securities, delivered by the appellant, with his note for 3,815 dollars, being for the purchase money of the lots of the trustee, should be returned; and that the note should be cancelled and surrendered—that a release should be executed, of the judgment at law obtained by the trustee, on the note, and for a perpetual injunction and general relief, &c.

Upon filing this bill, an injunction was granted, until further order of the Court; and, after various proceedings, the following decree was made:—

Greenleaf *vs.* Washington Boyd, and others. } In Chancery, April Term, 1824.

"It is ordered by the Court, in this cause, that the trustee appointed by the order of January 21st 1823, make and execute a good and sufficient deed to James Greenleaf, for the property sold to him by the former trustee, Washington Boyd, according to the terms of that sale; to be approved by one of the judges of this Court, and filed with the clerk, to be delivered to the said Greenleaf, upon the payment of the purchase money; and that he also obtain and file with the clerk, a sufficient deed of release, from Zachariah Walker, to be approved of by one of the judges of this Court, to the said James Greenleaf, releasing all title and claim to any and every part of the lots and property of the said Charles Minifie, sold by Washington Boyd, as trustee, or mentioned in the aforesaid deed of the trustee, Richard Wallack, to James Greenleaf; and that, upon the said deed, and the said deeds of release being executed, signed, approved, and filed, as aforesaid, that then the injunction be dissolved, and the trustee authorized to proceed in levying and collecting the amount of the judgment,

for the purchase money, as mentioned in said bill. And the original bill, and bills of revivor, having been set down for hearing, upon the bills, answers, and exhibits, and all the proceedings in the cause—it is, by the Court, on this 15th of December 1824, decreed and ordered, that the said bill be dismissed with costs.

"And it is hereby further ordered and decreed, that, before proceeding in collecting said purchase money, a good and sufficient bond shall be executed, in the penalty of 500 dollars, by any one or more of the creditors, with security, to be approved of by one of the Judges of this Court, conditioned to indemnify the said Greenleaf, his heirs and assigns, from all claim and demand of Francis Jameson, his heirs and assigns, to any part of the lots or property mentioned in the deed of the said Wallack, to said Greenleaf; which may have been purchased by the said Jameson, at the sale of the said Boyd, and filed with the clerk of the said Court."

By order, WILLIAM BRENT, *Clerk.*

15th December 1824.

From this decree, the complainant appealed.

The opinion of the Court, delivered by Mr. Justice Washington, fully states all the matter of the case.

The case was argued by Mr. Jones, for the appellant; and by Mr. Key, for the appellees.

Mr. Jones, for the appellant.—

1. The title of Charles Minifie, was never affected by the sale of Boyd to Mr. Greenleaf. The authority to sell, was a special one, and the terms not having been complied with—as the sale was *private*, and not *public*. Minifie, or his heirs, or his creditors, may proceed against the trustee—no time precluding the same. The case of Daniels *vs.* Adams. *Ambler*, 191. 1 *Bridg. Index*, 41.

A private sale was set aside, although more was obtained by the sale, than by a public sale; it being against the authority of the trustee. The Court cannot vary the terms of a trust. 1 *Anstruth.* 80. 4 *Brown's Chancery Cases*, 479.

2. Mr. Greenleaf had no notice of these objections to the title, until a few days before the filing of the bill; and it was then too late for this proceeding. 16 *Vez.* 272.

The title could not be completed, without the consent of Minifie and his wife; and no steps were taken, to obtain this—nor were the measures adopted, in reference to the titles acquired by Jameson, Prout, and Walker, who purchased some of the lots at the public sale, effective. The purchaser would still be obliged to go into chancery, to complete his title to some of these lots so purchased. Nor has a title been made to him by the heir of Boyd—if Mr. Wallack, the substituted trustee,

could convey her title, it could not be by virtue of the decree stated in the case, as Mr. Greenleaf was not a party to the proceeding.

The Court will not permit an executory contract, for land, to be carried into specific execution, until the seller can give a complete title. 4 *Vez.* 97. 2 *Vez. jr.* 100. 2 *Coxe*, 294. 5 *Vez.* 147. 16 *Ibid.* 272.

As to taking possession of property, being an acceptance of title, *Sugden on Vendors*, 9.

The sale made to Greenleaf, was a fraud on the public; and no title to the purchase money could be derived under it. A confirmation of the title held by Mr. Greenleaf, by the legal heir of Boyd, and by the creditors of Minific, was necessary; and it was not the duty of the purchaser, to seek out the heir. He had called upon Boyd, who had the trust, to do what was proper.

There was no ground to dismiss the bill, for want of proper parties—this should have been pleaded; this is never done, unless in a case where no decree can be made, without affecting those who are not before the Court.

Mr. Key, for the appellees.—

This is a case, where a purchase was made, when property was high, which has since fallen; and the purchaser, therefore, desires to relieve himself from the bargain. The terms of the trust were complied with, by the trustee—a public sale was made of the property—Greenleaf took possession, knowing all the facts; and, not until after judgment against him, for the purchase money, did he ask for a specific performance, and an injunction as to notice. Cited, 2 *John. Chanc. Cases*, 197.

The purchaser has not done what he ought to have done, to obtain a title. He should have filed his bill against all the persons interested—Minifie and the creditors; but the bill was against Boyd alone; and this authorized the conclusion, that the aid of Boyd only was wanting.

The case is one of a *bona fide* and regular sale, by the trustee—possession taken by the purchaser—execution of his contract, with full knowledge of all the circumstances, by the delivery of his promissory note, for the purchase money; and, afterwards, by proceedings without proper parties, and altogether irregular, an attempt by the purchaser to defeat the claims of the creditors of the *cestuy que trust.*

Mr. Justice WASHINGTON delivered the opinion of the Court:—

This cause comes from the Circuit Court of the District of Columbia, for the county of Washington. The appellant filed

his bill in that Court, against Washington Boyd; setting forth, that on the 19th of March 1817, the said Boyd, as trustee under a deed of Charles Minifie to him, entered into a contract with the plaintiff, for the sale of sundry lots in the city of Washington, at the price of $3,500, payable in 6, 12 and 18 months; for which, including the interest, and amounting in the whole to 3,815 dollars, he then gave his note to Boyd, who acknowledged the receipt thereof by an instrument under his hand; and thereby agreed, that on the payment of the note, he would convey to the plaintiff the said lots, which had been previously sold at public auction, two of them to Elliot, as agent for the plaintiff, and the others to Francis Jameson, William Prout, and Z. Walker. That, although the title to these lots which had been sold to Jameson, Prout, and Walker, had not been released from their claims, the defendant, Boyd, had nevertheless recovered a judgment against the plaintiff for the amount of his note before mentioned, upon which he threatened to sue out an execution. The prayer of this bill was for an injunction, and a conveyance of the lots with a clear title.

The plaintiff afterwards filed an amended bill setting forth the original negotiations between the plaintiff and Boyd, in March 1816, for the purchase of the above lots, which resulted in a contract, by which the plaintiff was to be considered as the purchaser of them, at the price of 3,500 dollars, payable with interest, in 6, 12 and 18 months. That the defendant had nevertheless thought proper to expose the said lots to sale at public auction, some time in April 1816, and had caused Elliot, the plaintiff's agent, to be set down as the purchaser of two of the lots only, at the price of 3,500 dollars, although neither Elliot nor the plaintiff was present; and that the remaining seven lots were struck off, three of them to Jameson at 159 dollars, one to Prout at 45 dollars 15 cents, and the remaining three to Walker, at 264 dollars 90 cents, making in the whole, the sum of 4,019 dollars 5 cents.

That matters remained in this situation until the 19th of March 1817, when the written contract mentioned in the original bill was entered into.

The bill then sets forth the judgment obtained by Boyd against the plaintiff, upon his note for the purchase money of the lots, and the deposit by the latter with the former of certain securities as collateral security for the debt, in consideration of a suspension of the execution until some time in December 1819. It farther charges, that the plaintiff was ignorant of the title and authority of the defendant to dispose of the above property, until within a few days preceding the filing of this amended bill; when, upon examining the land records of the county, he found the deed of trust from Charles Minifie and one James Ewell and

Z. Farrell, to the said Boyd, conveying the above lots to him in trust, to dispose of the same at *public sale*, on 6, 12 and 18 months credit, and to apply the proceeds to the payment of the debts of the said Minifie, and to hold what might remain after such payments, subject to the decree of the Circuit Court of the said district and county, in the suit brought by the wife of said Minifie for alimony; and the balance, if any, to be paid over to said Minifie. The bill then concludes, by charging that the contract made by the plaintiff with the defendant, for the purchase of the said lots, is void, because it was made in contravention of an injunction obtained by Mrs. Minifie, and because the purchase, by the plaintiff, was made at private, and not at public sale; that the title is likewise defective for the same reasons, and because the property is subject to the claim of Mrs. Minifie for alimony and for dower, and is not released from the claims of Prout, Jameson, and Walker, to the seven lots sold to them. The prayer of this bill is, that the contract may be declared void; that the judgment upon the plaintiff's note may be perpetually enjoined; and that the pledged securities may be restored to the plaintiff.

The injunction asked for, was granted, till further order. A petition was filed in the same Court, by William Prout and others, creditors of Charles Minifie, setting forth the death of Washington Boyd, leaving Eleanor, the wife of Nicolas L. Queen, his heir at law; and praying that another trustee might be appointed to complete the execution of the trusts of the deed from Minifie to Boyd. To this petition, Queen and his wife appeared and filed an answer, admitting the truth of the allegations in the petition, that the said Eleanor is the heir at law of Boyd; and submitting to such decree as the Court might think proper to make.

That cause being set for hearing on the petition and answer, the Court, on the 21st January 1823, made a decree by which Richard Wallack was appointed trustee in the place of Washington Boyd, deceased, upon his giving bond and security; with authority to complete the trusts left unexecuted by Boyd, according to the provisions of the trust deed, and to recover and collect the purchase money for such of the trust property as had been sold by Boyd; and upon the payment thereof, to convey said property by a good and sufficient deed, in fee, to the purchasers thereof, and to bring the said proceeds of sale into the Court, to be distributed as the said Court might direct, according to the deed of trust. A bond was accordingly executed by Wallack, approved by one of the Judges of the Court, and filed amongst the proceedings in that cause; a transcript of which proceedings was made an exhibit in this cause; on the same day the above decree was passed, the Court decreed, in

this cause, that the plaintiff should, on or before a certain day, proceed in the same, by making the heirs of Washington Boyd defendants, as also such other persons as might be necessary to enable the Court to decree therein; otherwise that the bill of the plaintiff should be dismissed.

In May 1824, the plaintiff filed a bill of revivor against N. L. Queen and Eleanor his wife, heir at law of Washington Boyd, and Richard Wallack, administrator of the said Boyd; to which bill Queen and wife appeared, and by consent of parties, the answer filed by them to the petition of Prout and others, was received as an answer to the bill of revivor, and the original suit was agreed to stand revived.

The cause was then set for hearing on the bills, answer and exhibits, and all the proceedings in this cause, and also in the petition of Prout and others before mentioned; whereupon the Court decreed that Richard Wallack, the trustee appointed by the order of the 21st of January 1823, should execute a good and sufficient deed to the plaintiff, for the property sold to him by Boyd, the former trustee, according to the terms of that sale, to be approved by one of the Judges of the Court; to be filed with the clerk; and to be delivered to the plaintiff, upon the payment of the purchase money; that he should also obtain and file with the clerk, a sufficient deed of release by Zachariah Walker, to be approved as aforesaid, to the plaintiff, releasing all title and claim to any and every part of the property of Charles Minifie, sold by Boyd as his trustee; and that upon the said deeds being executed, approved, and filed, as aforesaid, the injunction granted in this cause should be dissolved, and the trustee be authorized to proceed to levy and collect the amount of the judgment for the purchase money, as mentioned in the bill. The decree then proceeds to dismiss the bill, with costs; and that before proceeding to collect the said purchase money, a good and sufficient bond should be executed, in the penalty of 500 dollars, by any one or more of the creditors, with security, to be approved by one of the Judges of the Court, with condition to indemnify the plaintiff, his heirs and assigns, from all claim and demand of Francis Jameson, his heirs and assigns, to any part of the lots or property, mentioned in the deed of the said Wallack to Greenleaf; which might have been purchased by the said Jameson, at the sale of Washington Boyd, and filed with the clerk of the Court. From this decree, the plaintiff appealed to this Court. A deed by Richard Wallack to James Greenleaf, bearing date the 2d of August 1825, a bond of indemnity executed by Jonathan and William Prout, and a deed of release by Z. Walker, as directed by the aforesaid decree, dated the 3d and 7th of February 1825, were executed, approved, and filed with the clerk of the Court, in con-

formity with the decree, and form parts of the record brought up by this appeal.

The first objection made by the appellant's counsel to the decree of the Court below, is, that the contract between the appellant and Washington Boyd, for the sale of the lots mentioned in the bill, was void, for want of authority in the latter, to dispose of the property in any other mode, than at public auction. Such, it must be acknowledged, is the mode prescribed by the deed of trust; nor can it be questioned, but that the trustee was bound to conform to this, as well as to the other requisitions of the deed, under which he professed to act. This was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other, although by doing so, he might, in reality, promote the interest of those for whom he acted.

But what are the facts in the present case?

The nine lots, which formed the subject of the correspondence between the appellant and the trustee, in March 1816, and of the written contract, on the 19th of March 1817; were actually advertised, as directed by the deed of trust; were set up for sale, as the amended bill alleges, at public auction, in April 1816, and were sold for the sum of 4019 dollars 5 cents. Two of them were set down to S. Elliot, the agent of the appellant, at the price of 3500 dollars; and the other seven were struck off to Jameson, Prout, and Walker, for the remaining sum of 519 dollars 5 cents.

It is not even charged in the bill, much less is there any proof in the cause, to warrant a suspicion that the sale was not fairly conducted; or that any person bid for the two lots set down to Elliot, more than the sum at which they were charged to him.

In making the sale in that mode, no deception was practised upon the appellant; since he was informed, by Elliot's letter to him, of the 16th of March 1816, that Mr. Boyd had further postponed the sale of Minifie's property, and would consider him, Greenleaf, as the purchaser for 3500 dollars. The writer adds "I have stipulated, that the whole property shall be included. It is necessary to go through the forms prescribed by the decree;" meaning, no doubt, if the letter be truly transcribed into the record, the trust deed. But, on the 19th of March 1817, when the contract was finally reduced to writing, the appellant was distinctly apprized, that the whole of the lots had been sold at public sale, at six, twelve, and eighteen months; and he was then satisfied to give his note for the stipulated sum agreed to be paid for the nine lots, upon the engagement of Boyd, to make a deed for the same to Samuel Elliot. Upon what plausible ground, then, can the appellant

now insist, that the lots were not sold at public auction, and, on that ground, to seek to be relieved against the payment of his note, given for the purchase money, thus agreed to be paid for the property? The argument urged by his counsel, that the contract is void, because the lots were sold to the appellant for a less sum than that at which they were struck off to the purchasers, at the public sale, cannot, for a moment, be maintained; since, whatever might be the liability of the trustee to the *cestuy que trust*, to pay the difference between those sums, it is surely not an objection, in the mouth of the appellant, sufficient to release him from his contract.

But, were it to be admitted, that Boyd acted in derogation of his trust, in selling the property to the appellant for a less sum than he actually sold it for at public auction, and that on that account, the title of the appellant might be impeached; may not the objection be removed by the agreement of the parties, beneficially interested in the property under the deed of trust, to confirm the sale; or, by their acts, tending to produce the same result? Of this we apprehend there cannot exist a doubt. Now, who are the parties for whose benefit this trust was created? They are the creditors of Charles Minifie, in the first instance; and after they are satisfied, Mrs. Minifie, to the extent of the sum which might be decreed to her for alimony; and then Charles Minifie, as to any balance which might remain. But it appears from the exhibits filed in the cause, that the amount of the debt due by Minifie, and for which judgments were obtained against him, exceeded considerably the sum at which these lots sold at public auction, independent of the interest due upon those debts, and the costs of the different suits in which the judgments were entered. The only persons, then, who are beneficially interested in the property conveyed by the deed of trust, are the creditors of Charles Minifie, who have united in a suit against the heir at law of Boyd, for the purpose of having a new trustee appointed to carry into execution the sale made of the property by the former trustee, under the deed of trust; and they are, as the bill charges, the active parties in enforcing the payment of the purchase money; after these solemn acts, done in affirmance of the sale made to the plaintiff, the creditors would never be permitted, by a Court of Equity, to impeach it; nor can the alleged breach of trust be urged by the appellant, as a reason for annulling the contract, or excusing him from the payment of the purchase money.

The next objection made by the appellant's counsel to the decree of the Court below, is, that the title of the property, which it directs to be conveyed to the appellant, is defective; being encumbered with the claim of Francis Jameson to three

of the lots, and with the right of dower of Mrs. Minifie in the whole of the property.

It is very manifest, that the title of Jameson, if any he has, is merely nominal. The sale to him was made in 1816, upon six, twelve, and eighteen months credit; and, by the terms of the sale, he was required to give his note for the purchase money, with an approved endorser, negotiable at one of the banks in this district. The bill does not charge, nor is it even alleged at the bar, that a note was given by Jameson for the purchase money, bid for these lots; not one cent of it has been paid by him, or even demanded; or that, from the year 1816, when the sale was made, to the present moment, a claim to the property has been asserted, or intimated, by this person. But, it does appear, by the testimony of a witness examined in the cause, that the plaintiff, Greenleaf, has been in possession of the whole of the property, from the time that he purchased it; and that Jameson had, upon the application of Boyd to relinquish his claim to the property, consented to do so.

Upon this state of facts, this Court can feel no hesitation in saying, that Jameson had not such an equitable title to the lots purchased by him, as a Court of Equity would enforce against the trustee of Minifie, or against the plaintiff. Whether that Court would require a title like this to be released, in a case where a trustee was a party plaintiff, asking for a specific execution of the contract, need not be decided in this case. But we are clearly of opinion, that the want of such a release cannot be urged by the vendee, as a cause for rescinding the contract.

The objection founded on the right of dower of Mrs. Minifie, is quite as untenable as the one that has just been disposed of. The plaintiff, when he made the purchase of this property, was apprized that he was dealing with a trustee—and knew, or might have known, from the land records of the county in which the property was situated, whether Mrs. Minifie was a party to the deed of trust; and had, or had not, relinquished her right of dower. He required of the trustee no stipulation in relation to this right—and it may therefore be fairly presumed, that the value of it was taken into consideration, in fixing the amount of the purchase money to be paid for the property. In such a case, as well as in that which we have just disposed of, a Court of Equity will not interpose to relieve the vendee, but will leave him to such legal remedy as he may be entitled to, in case his title should, at any future time, be disturbed by these claims.

The Court is, upon the whole, of opinion, that the objections to the decree, which have been noticed, are insufficient to warrant a reversal of it. It is, however, exposed to other

objections, which must produce this result, and which now remain to be examined.

The first is, that Richard Wallack, the substituted trustee, who is required by the decree to perform a number of acts, in order to entitle him to levy and to collect the amount of the judgments for the purchase money, and upon the performance of which the injunction is dissolved, was no party to the controversy in the Court below. The suit, it is true, was revived against him in his character of administrator of Washington Boyd, and also against the heir at law of Boyd; to which mode of proceeding no objection could be taken, if the decree had been against him in his character of administrator, because, in that character, he claimed under a title derived from the party, by whose death the abatement of the suit was caused; and was the person designated by law to represent him, in relation to his personal estates.

But this was not the case in respect to Richard Wallack, as the substituted trustee and successor of Boyd. The power, with which the latter was clothed, became vested in Wallack, not by operation of law, but by the appointment of the Court, subsequent to the institution of the suit. The original suit, which abated by the death of Boyd, became also defective by the termination of his powers, and the appointment of a new trustee, and could only be prosecuted against him by way of a supplemental bill, in nature of a bill of revivor; in which it would be necessary to state, not only the original bill and the proceedings thereon, and the death of the former trustee; but the appointment of Wallack as his successor, and his acceptance of the trust; and to require him to appear and answer the charges contained in the supplemental and original bills. For any thing appearing upon the face of this record, Wallack is an entire stranger to the trust with which the decree connects him, and without any power, whatever, to make a valid conveyance. For there being no supplemental bill, or allegation in any bill that Wallack had been appointed to complete the trust which Boyd had left unexecuted, and to collect the purchase money for the property which that trustee had sold, and that he had accepted such appointment; these facts cannot be considered as having been established by the proceedings and decree in the suit of the creditors of Minifie, against the heir at law of Boyd. See *Miff.* 38. 63. 70.

The next objection to the decree is, that after decreeing Wallack to perform a number of acts to entitle him to levy and collect the amount of the judgment against the appellant, as before mentioned, it proceeds to dismiss the bill with costs; thereby putting the cause out of Court, and rendering the other parts of the decree ineffectual. Should Wallack, for ex-

ample, refuse to execute a conveyance of the property to the plaintiff in the Court below, pursuant to the decree, the non-existence of the suit on which that decree was made, would prevent any process of contempt from issuing against him, for the purpose of compelling him to execute the decree. It is no answer to this objection, that it appears by the record in this case, that Wallack has in fact executed the decree on his part; since the error complained of is in the decree itself, and not in its execution.

It was insisted by the counsel for the appellees, in anticipation of the above objection, that the Court below would have been warranted in dismissing the bill absolutely, without requiring any thing to be performed by the new trustee, in consequence of the omission of the plaintiff in that suit to make proper parties.

That a bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay in doing so, need not be questioned—but to do so without a demurrer, plea, or answer, pointing out the person or persons who the defendants insist ought to be made parties, is unprecedented, and would most unquestionably be erroneous, although the decree should assign this as the ground of dismission; which is not done in the present case.

The last objection to the decree, which it is thought necessary to notice, is, that the heir at law of Washington Boyd, deceased, is not required to release her title to the property in controversy to the appellant; a majority of this Court being of opinion, that the legal estate in that property did not pass to Richard Wallack, under the decree of the 21st of January 1823, before referred to, but is yet outstanding in the heir at law of Boyd.

The decree of the Court below must, for these errors, be reversed, and the cause is to be remanded to that Court for further proceedings to be had thereon, in conformity with the principles before stated.

Decree.—This cause came on, &c, on consideration whereof, It is the opinion of this Court, that there is error in the said decree, in requiring any act to be performed by Richard Wallack, before he was made a party to the said suit, by regular proceedings against him, according to the course and practice of a Court of Chancery, and had either answered the bill making him such a party, or the same had been taken for confessed, against him; and that the said decree is also erroneous, in dismissing the bill of the plaintiff in the Court below; and also, in not decreeing the said Nicholas L. Queen, and Eleanor Queen his wife, the defendants in the said suit, to release to the ap-

pellant, James Greenleaf, all their right and title to the property directed by the said decree to be conveyed to him, by the said Richard Wallack; for which errors, it is now by this Court decreed and ordered, that the said decree be reversed and annulled, and that the cause be remanded to the Court below, to be there proceeded in, according to law, and in conformity with the principles stated in this decree.

BENJAMIN BUCK & THOMAS HEDRICK *vs.* THE CHESAPEAKE INSURANCE COMPANY.

Insurance. To affirm, that "in policies for whom it may concern," there *can* be no undue concealment as to the parties interested in the property to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, *if he makes the inquiry*. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases. {159}

A policy "for whom it may concern," will, in ordinary cases, cover belligerent property. {160}

A knowledge of the state of the world—of the allegiance of particular countries—of the risks and embarrassments affecting their commerce—of the course and incidents of the trade on which they insure, and of the established import of the terms used in their contracts, must necessarily be imputed to underwriters. {160}

The term *interest*, as used in application to the right to insure, does not necessarily imply *property*, in the subject of insurance. {163}

The master of a vessel, to whom property shipped on board the vessel under his command is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy. {163}

As to the effect of certain instructions in a letter relative to insurance, and circumstances connected with the same, constituting a representation to vitiate a policy, made under the authority and directions of the letter. {163}

THIS case came before the Court, upon a division of opinion of the Judges of the Circuit Court of the United States for the district of Maryland. The action was brought upon two policies of insurance, upon a cargo of sugar, on board the brig Columbia, in the name of the plaintiffs, for the use of Daniel Fitch; who was an American citizen, a sea captain, sailing out of the port of Baltimore, and the owner and commander of the Columbia; and of Gregorio Medina, of Ponce, in the island of Porto Rico.

The plaintiffs were the agents of Daniel Fitch; and, by two distinct orders, under different dates, had policies effected upon their application, by the Chesapeake Insurance Company.

The amount of the separate interests of captain Fitch and G. Medina, was shown by the following statement, which was admitted to be correct:—

(Buck & Hedrick *vs.* The Chesapeake Insurance Company.)

The entire cargo embraced in the two policies, was—	$ 8413 75
All marked F. in the bill of lading, belonging to captain Fitch, viz:—thirteen hogsheads, five tierces, and ninety-two barrels of sugar, amounting to—	2076 75
Add charges—	198 50
Amount of the absolute and legal or equitable property of captain Fitch,	$ 2275 25
The residue belonged to G. Medina, the legal title to which, was in captain Fitch, amounting to—	$ 5610 65
Add charges—	527 85
	8413 75
Amount of the two policies—	8000 00
Not covered—	$ 413 75

The Columbia, with her cargo, sailed from Porto Rico for Baltimore; the cargo consigned to captain Fitch, and documented as such; G. Medina being on board of the vessel, on a visit to the United States. Both vessel and cargo were totally lost, near Norfolk, by the perils of the sea.

The circumstances attending the insurance, and the facts out of which the controversy arose, were as follows:—

On the 6th of May 1822, the plaintiff presented to the office the following order—

"Insurance is wanted against all risks, for account of whom it may concern; 3000 dollars on the brig Columbia, Daniel Fitch master, and on cargo, 6000 dollars, as interest may appear, at and from Ponce, Porto Rico, to Baltimore; by a letter from captain Fitch, dated 19th April, he says he expects to sail about 5th to 10th of May, that the brig is in good order, perfectly tight and seaworthy—what premium?"

1¼ per cent., (written on the order by the office.)

Accepted, Buck & Hedrick.

A policy was executed on the same day, on cargo, 6000 dollars, insuring Buck & Hedrick, "for whom it may concern." The perils insured against are, "of the seas, men of war, fire, enemies, pirates, rovers, thieves, letters of marque, arrests, taking at sea, restraints of princes; and all other perils, losses, and misfortunes, for which assurers are legally accountable.

No inquiry was made by the office for the letter of 19th April, alluded to in the above order; nor was any warranty or representation of any kind made or asked for, in regard to said cargo, but the office executed said policy on said order.

(Buck & Hedrick vs. The Chesapeake Insurance Company.)

On the 24th May, Buck and Hedrick made application for further insurance on cargo; and the following letter from Captain Fitch, dated 27th April, was presented to the office, with an order written on the back of said letter; and a like policy was executed for "whom it may concern," without any inquiry for the said letter, of 19th April, and for the same premium.

"*Ponce, April 27th*, 1822.

"Messrs. Buck & Hedrick—

Gentlemen—I wrote you a few days ago, by the brig Ospray, Captain Perkins, direct for Baltimore, requesting you to have insurance done for me, on the brig Columbia and her cargo, owned and commanded by me, to sail from this for Baltimore, about 5th to 10th May, with a cargo of sugar. When I wrote to you by the Ospray, I could not say what amount of cargo to have insured for me; I now think I shall have on board about 130,000 lbs. valued at 8,000 dollars, which amount I wish you to have insured for me, at as low a premium as you can. I wish you to understand, that the above sum of 8,000 dollars, is not in addition to that mentioned in my last. The whole amount I want insured, is 8,000 dollars on cargo, and 3,000 dollars on the vessel and freight. She is in perfect good order, tight in every part, built in New-Jersey in 1814, and well found.

Your attention to the above, will oblige

Your obedient servant,

Daniel Fitch."

On the back of this letter was written the following: "What will 2,000 dollars be insured at, agreeable to within letter, on cargo, of which you have 6,000 dollars insured some time since.

Buck & Hedrick.

1¼ per cent. (agreed as interest may appear.)

Buck & Hedrick.

Buck and Hedrick applied to the defendant for payment on said policies, and all the papers to prove the distinct interests of Medina and Fitch were shown; but the office declined to pay either, on the ground that said policy covered no one but Fitch, and that the letter of 27th April, was a representation that the whole cargo was Captain Fitch's, and therefore affected both policies.

The plaintiff, on the trial, prayed the Court to charge the Jury.—

1st. That as the policies of insurance in this case, purport to insure the plaintiff "for whom it might concern;" they are not bound to prove, that at the time of effecting said insurance, or any other time, they disclosed to the defendants, that Spanish

property was intended to be covered by said insurance; and that in policies of such description, there can be no undue concealment as to the parties interested in the property to be insured.

2d. That if the jury believed the policy of 6th May 1822, was founded on the order of the same date, the said policy being "for whom it may concern," does cover belligerent as well as neutral property.

3d. That if the jury believed that the policy dated 24th May 1822, was founded on the letter of 27th April 1822, and the order written therein, the policy being "for whom it may concern," does cover belligerent as well as neutral property.

4th. That if the said Daniel Fitch, at the date of said policies, was legal and equitable owner of a part of the cargo insured, and the legal, though not equitable owner of the residue; the policies "for whom it may concern," do cover the entire cargo; and said Daniel Fitch is competent in law to recover the whole in his own name, though the belligerent character of a part of the said cargo, was not disclosed at the time of effecting said policies of insurance.

5th. That the Court instruct the jury, that the letter of 27th April 1822, with the order written thereon, do not in law amount to a representation, that the property to be insured, was the sole property of Daniel Fitch, or that the whole, or any part thereof, was not belligerent.

Upon these several prayers, numbered in the record, 1, 2, 3, 5 and 6, the Judges of the Circuit Court, differed in opinion, and certified the same to this Court.

The cause was argued by Mr. Hoffman and Mr. Mayer, for the plaintiffs—and by Mr. Wirt, Attorney General, and Mr. Meredith, for the defendants.

The plaintiffs' counsel contended, 1st, a policy for whom it may concern, covers all possible persons and all possible interests, belligerent as well as neutral. Hodgson *vs.* Marine Insurance Company. *5 Cran.* 100.

The doctrine has been so settled in France, England, New-York, Massachusetts, &c. *Phil. on Ins.*, *57 to* 63. 107. 2 *Mag.* 211. 2 *Emeri.*, 460. *Ordi. Hans T. Tit.* 1. § 4. 1 *Emeri. ch.* 2, § 4. *ch.* 11, § 4. 2 *Dane's Abr.* 127. 1 *Mar. on Ins.* 306. 215, in notes. *Norris's Peake*, 346-7-8. *John. Dig.* 274, § 41. 43. 280, § 108.

Barnwell *vs.* Church. 1 *Caines' Rep.*, 217. 229. 237. 238. 243. Murray *vs.* Uni. In. Com. 2, *John. Cas.* 168. Skidmore *vs.* Desdoity, 2 *John. Cas.*, 77. Etting *vs.* Scott, 2 *John. Rep.* 157. 163. Goix *vs.* Knox, 1 *John. Cas.*, 337. 1 *Mar. on Ins.*, 306. 310. Lawrence *vs.* Sebor, 2 *Caines' Rep.* 203. Hagedorn *vs.* Oliverson, 2 *Maul and Selw.*, 485. Sleinback *vs.* Rhinelander, 3 *John. Cas.*, 269. Vanderheuvel *vs.* Uni. In. Com., 2 *New-York*

Cas. in Error, 217. 269, and 2 *John. Cas.*, 127. 451. *Cranch*, 100. 109. Seamans *vs.* Loring, 1 *Mason*. 128. 125. 136.

Was there a *concealment of belligerent interest?* Concealment can only have reference to the contract between the parties; *non-disclosure* is not concealment; and the party charging it must show fraudulent intention. As to the words, "lawful goods and merchandise," the parties refer to municipal sanctions only, and not to foreign circumstances. 1 *Johnson's Cases*, 77. 120. 487.

Upon the doctrine of concealment, non-disclosure, or misrepresentation; the following positions were assumed, and claimed to be sustained by the authorities cited.

1. That no disclosure of any thing within the essential nature of the policy, could be necessary—and consequently, that no undue concealment can be predicated, either as to the persons interested, or their country.

2. That there has been neither a representation, nor a misrepresentation, in regard to the cargo insured.

3. That the first policy stands upon nothing but the order of 6th May, in which order no one feature of a representation of neutrality is to be found, but the very reverse.

4. That the letter, and on which the second policy, viz. for 2000 dollars, was effected, contains no such representation, in regard to the cargo then to be insured—and if it did, it was strictly true, as Daniel Fitch's absolute interest amounted to 2,275 dollars 25 cents.

5. That this letter, if a representation at all, as to the neutrality of the cargo covered by this second policy, can in no way affect, by a retroactive energy, the antecedently executed policy.

6. That the office, having neglected to make those inquiries, which, under the circumstances of the case, the law imposed on it, cannot now transfer to the insured, the effect of an obligation to disclose voluntarily, what would have been willingly communicated, had the office, at that time, deemed it of consequence to inquire after.

7. That Daniel Fitch, being the consignee and trustee of the whole of Medina's interest, with full authority to insure, and having the custody of the entire cargo, laden on board of his vessel, had an insurable interest in the whole; and might, had he seen fit so to do, have truly represented the whole as his own, for the purpose of effecting insurance.

Phill. on Ins. and Authorities, 64. 94. *Phill. on Ins.*, 86. 89. *John. Dig.*, page 284, § 143, 144. 146, 147 to 153. *Wharton's Dig.*, 319, § 23. 30. 32. *Phill. on Ins.*, 87. 7 *Cranch*, 506. 1 *Caines*, 75. 492. 2 *John. Cas.*, 487. 1 *John. Cas.*, 1. 2 *John. Cas.*, 77. 120. 1 *New-York Cases in Error, XXV.* 2 *John. Rep.*, 130.

(Buck & Hedrick *vs.* The Chesapeake Insurance Company.)

Anthon's N. P. Cases, 83. *Phill.*, 69. 90. 4 *East*, 590. Dennis *vs.* Ludlow, 1 *Caines*, 111. 217. Long *vs.* Bolton, 2 *Bos. and Pull.*, 209. Boyd *vs.* Dubois, 3 *Camp.*, 133. 312. 13 *Rep.*, 61. 267. 9 *East*, 283. 292. 1 *Camp.*, 116, 117, 118. 1 *Maul and Selw.*, 35. Long *vs.* Duff, 2 *Bos. and Pull.*, 209. *Phill.*, 101. *Marshall*, 473, *note*. Brown *vs.* Shaw, 1 *Caines*, 489. Depeyster *vs.* Gardiner, 1 *Caines*, 492. Fort *vs.* Lee, 3 *Taunt.*, 381.

2. It was the duty of the insurers to inquire into the state of things at the time of the contract, and there was no representation of a sole neutral interest.

The insured asks to be insured against "all risks;" and it was therefore the duty of the office to inquire what risks were intended to be covered.

Authorities cited as to the general nature of representation: *Mar. on Ins.* 450, 451. *Phill. on Ins.* 80. 6 *Cranch*, 274 *to* 281. 7 *Cran.* 507, 535, 536, 541. *Phill. on Ins.* 84. 14 *Mass. Rep.* 152. 1 *Mar. on Ins.* 459. *Phill. on Ins.* 109, 110. Pawson *vs.* Watson, *Cowp.* 785, or *Mar. on Ins.* 459. Bize *vs.* Fletcher, *Doug.* 271, or *Mar. on Ins.* 459. *Phill. on Ins.* 106. Alsop *vs.* Coit, 12 *Mass. Rep.* 40, or *Phill. on Ins.* 110. Ross *vs.* Bradshaw, 1 *Black. Rep.* 312, or *Phill. on Ins.* 110. *Wharton's Digest*, p. 380. § 28, 30, 31, 32. Hubbard *vs.* Glover, 3 *Camp.* 312. Clapham *vs.* Colozare, 3 *Camp.* 382. Dawson *vs.* Atty, 7 *East*, 357. Hodgson *vs.* Marine Insurance Co., 5 *Cran.* 100. Livingston and Gilchrist *vs.* Marine Insurance Co., 6 *Cranch*, 274. 7 *Cran.* 507. Vandanheuvel *vs.* Uni. Insurance Co., 2 *Caines' Cases in Error*, 257, 267 to 282. *Doug.* 305.

Authorities cited as to the duty of underwriters, to make inquiries: 1 *Mar. on Ins.* 397, 474, 475. *Phill. on Ins.* 84, 108, 109. 2 *Dall.* 274. 2 *Yates*, 178. Fort *vs.* Lee, 3 *Taunt.* 381. *Phill. on Ins.* 105. 14 *East*, 479. *Wharton's Dig.* 319 § 23. 1 *Camp.* 383. *Phill. on Ins.* 63, or Davis *vs.* Boardman, 12 *Mass. Rep.* 80. Boyd *vs.* Dubois, 3 *Camp.* 133. Duplanty *vs.* Com. Ins. Co., *Anthon's Rep.* 83. Livingston and Gilchrist *vs.* Mary. Ins. Co., 7 *Cran.* 508, 536, 538, 547.

3d. That even if the letter of 27th April, had asserted that Daniel Fitch owned the cargo, it was (as far as the doctrine of representation is concerned,) substantially true; he being the legal owner as trustee, and consignee of Medina's part, and as such, competent to sustain any action for that part of the cargo, and also to represent, though perhaps not to warrant it, as his. *Phill. on Ins.* 41, 42, 60. Rind *vs.* Wilkinson, 2 *Taunt.* 237. Joseph *vs.* Knox, 3 *Camp.* 320. 3 *Wheat. Selw.* 774, 775, and note. M'Andrew *vs.* Bell, 1 *Cas. N. P. C.* 373. Lucena *vs.* Crow, 2 *New. Rep.* 323. 3 *Bos. & Pull.* 75. *Phill. on Ins.* 58. *Mar. on Ins.* 104 to 118. Routh *vs.* Thompson, 11 *East*, 428. Ludlow

vs. Browne, 1 *John. Rep.* 15. Caruthers *vs.* Sheddon, 6 *Taunt.* 14, or 1 *Serg. and Lowb.* 293.

4th. That even admitting the letter of 27th April, to be a gross misrepresentation, it can, in no way, affect either policy.

Not the first policy, because that policy was founded solely on the order of 6th May, and was executed several weeks before the letter of 27th April was in the country.

Not the second policy, because, as respects that portion of the cargo, covered by the 2,000 dollars policy, the letter was strictly true, Fitch's interest exceeding that amount. 1 *Mar. on Ins.* 455, 456. 2 *Wheat. Selw.* 750, note (41.) *Phill. on Ins.* 80, 81, 84, 85. Marsden *vs.* Reid, 3 *East*, 572. Dawson *vs.* Atty, 7 *East*, 367. Bell *vs.* Carstairs, 2 *Camp.* 543. Forrester *vs.* Pigou, 1 *Maul and Sel.* 13. Brine *vs.* Featherstone, 4 *Taunt.* 871. Etting *vs.* Scott, 2 *John. Rep.* 157, 162.

On the part of the plaintiff, it was also urged, that the policy of the 6th of May is not to be connected with that of the 24th May; no representation was made whatever, when the first policy was entered into.

The insurance on the property on board the Columbia, was properly made under the authority and order of Daniel Fitch; who, as master of the brig, and in the relations which existed between him and Mr. Medina, had a right to order the same.

Even gratuitous insurances are not *void*, but *voidable*. The tests of such insurances are, was the premium secure, and had the party a right to abandon? The cases cited by the defendants' counsel, do not impugn these principles, but sustain them.

Mr. Meredith, and Mr. Wirt, Attorney General, for the defendants.

The letter of the 27th April, was a representation of neutral property; and it is insisted, that the terms "for whom it may concern," may be limited by a representation, and the case before the Court; the representation was not true.

It is admitted that the stipulations in a policy, may be enlarged by a representation, and if enlarged, why not restricted? Earquart *vs.* Bernard, 1 *Taunt.* 450.

As to a representation and its effect, the following cases were cited:—1 Seam *vs.* Lowry, 1 *Mason's Rep.* 136. 2 *Johns. Rep.* 157, 163. 2 *Caines*, 203. 2 *Johns. Cas.* 451. 173.

The representation having been made by a resident owner, was in effect a warranty of neutrality. *Phill. on Ins.* 82. 6 *Mass.* 220. 2 *Johns. Cas.* 451. 173.

A representation must correspond with the facts represented, and must be as favourable to the insurers, as if it had been literally true. *Phill. on Ins.* 102. 2 *Johns. Cas.* 168. 6 *Mass. Rep.* 212. No case has been cited by the counsel for the plaintiffs, where the cover of property by fraud was protected. Here,

the cover was false, and intended to protect the property of Medina, a belligerent.

Captain Fitch had not an insurable interest in the property of Medina, and as an agent, he was guilty of a misrepresentation. Lucena *vs.* Crawford, 2 *New. Rep.* 323. 11 *East*, 434.

The first policy exhausted the whole of Captain Fitch's interest in the property, and left nothing for the second policy; and the second could not operate, there being a claim against prior insurances in the policy.

False lights were held out to the underwriters by the letter, and while they supposed they undertook a *peace risk*, they had assumed a war risk.

The insured are bound to show, that the property insured was intended to be insured by the policy; and there is no evidence of any authority given by Medina to Fitch, to cause the insurance to be made, or that the same was made for him. *Phill. on Ins.* 57, 58, 61. 3 *Johns. Cas.* 269.

As to an adoption of a policy, it must be done by the person for whom the insurance was intended. 2 *Maul and Selw.* 485. 1 *Mason's Rep.* 136.

Mr. Justice JOHNSON delivered the opinion of the Court.—

This cause comes up from the Circuit Court, for the Maryland District, on a difference of opinion.

The suit below, was instituted on two policies of insurance, the one for 6000 dollars, the other for 2000 dollars, upon the brig Columbia, Daniel Fitch master, at and from the Spanish island of Porto Rico to Baltimore, *for whom it may concern.* Buck & Hedrick were the agents of Fitch, and the policies were made in their name. The first policy was executed on the 6th of May, 1822, and stands unimpeached by any circumstances occurring at the time of its execution. But, when application was made for the second policy, which was on the 24th of May, the agents laid before the underwriters a letter, dated *Ponce*, April 27th 1822, to this effect:—

Messrs. BUCK & HEDRICK—

"I wrote you a few days ago by the brig Ospray, Captain Perkins, direct for Baltimore, requesting you to have insurance *done for me* on the brig Columbia, and her cargo, owned and commanded by me, to sail from this for Baltimore, about 5th to 10th of May, with a cargo of sugar. When I wrote you by the Ospray, I could not say what amount of cargo to have *insured for me.* I now think I shall have on board about 130,000 pounds, valued at 8000 dollars, which amount I wish you to have *insured for me.*" &c.

The rest has no material bearing upon the cause. On the back of this letter was written the following inquiry:

(Buck & Hedrick vs. The Chesapeake Insurance Company.)

"What will 2000 dollars be insured at, agreeable to within letter, on cargo, of which you have 6000 dollars insured some time since? BUCK & HEDRICK."

The vessel and cargo were totally lost by the perils of the sea; and the interest proved at the trial, consisted of above 2000 dollars, the property of Fitch, and above 6000 dollars, the property of G. Medina, a Spanish subject, of Porto Rico, at that time affected with the character of a belligerent.

The whole cargo was consigned to Daniel Fitch, and documented as his—Medina himself being on board, on the voyage.

The order for insurance, on which the policy of 6th May was effected, was in the following words: "Insurance is wanted against all risks, *for account of whom it may concern*, 3000 dollars on the brig Columbia, Daniel Fitch master, and on cargo, 6000 dollars, as interest may appear, at and from Ponce, Porto Rico, to Baltimore; a letter from Captain Fitch, dated 19th April, says, he expects to sail about 5th to 10th of May—that the brig is in good order, perfectly tight and seaworthy. What premium?

Both policies, it appears, were done at a premium of 1½, and on neither occasion was the letter of the 19th April called for by the office, nor was any warranty or representation of any kind made or asked for, respecting the cargo; beyond what was voluntarily made, and has been stated.

The first instruction on which the Court below divided, was prayed for by the plaintiffs, in these words:

"That as the policies of insurance in this case purport to insure the plaintiffs "*for whom it might concern*," they are not bound to prove, that at the time of effecting the insurance, or any other time, they disclosed to the defendants that Spanish property was intended to be covered by the insurance; and that in policies of such description, there can be no undue concealment as to the parties interested in the property to be insured.

Dangerous as it always is, in a Court of Justice, to generalize in the propositions which it decides, it is peculiarly so, in questions arising on policies of insurance.

The present proposition is obviously couched in terms too general to admit of an answer in the affirmative, without restriction or modification. And as Courts of Justice are not bound to modify or fashion the instructions moved for by counsel, so as to bring them within the rules of law, if this cause had come up on a writ of error to the judgment of the Court below, for refusing the instruction as prayed; it would be difficult to say, that in the terms in which it is presented, the Court was bound to give this instruction.

To affirm, "That in policies of such description, there can be no undue concealment as to the parties interested in the

property to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, if he makes inquiry—the assured may be silent, it is true, if he will, and let the premium be charged accordingly —but if the inquiry then made should be responded to, with information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy; which may differ materially from the known and received signification in ordinary cases. He, for instance, who should insure "*for whom it may concern,*" under an express assurance, that there is no belligerent interest in the cargo, could not, upon any principle, be held to have made assurance upon belligerent interest.

This is no more than the application of the general principle, that insurance is a contract of good faith, and is void, whenever imposition is practised.

That a policy "*for whom it may concern,*" will, in ordinary cases, cover belligerent property, has been fully conceded in argument. Nor is it contested, that previous representation will be sunk or absorbed, or put out of the contract, where the policy is executed in obvious inconsistency with those representations. But the ground here insisted on for defendants, is, that the letter of April 27th, was a representation that the whole cargo was Captain Fitch's, and that it thereby operated as an imposition upon the underwriters, and as such, avoids both policies; or that it affixes a conventional meaning to the phrase, in these policies, which limits its ordinary import.

Is there any thing in the case sufficient to except these policies from the ordinary import and effect of the phrase "for whom it may concern?"

We are of opinion there is not.

Whatever turn of expression may be given to the question, or in whatever aspect it may be presented, it is obviously, at last, no more than the simple question, have these underwriters been entrapped, or imposed upon, or seduced into a contract, of the force, extent, or incidents of which, a competent understanding cannot be imputed to them?

A knowledge of the state of the world, of the allegiance of particular countries, of the risks and embarrassments affecting their commerce, of the course and incidents of the trade on which they insure, and the established import of the terms, used in their contract; must necessarily be imputed to underwriters. According to a distinguished English jurist, Lord Mansfield, in Pelly *vs.* The Royal Exchange, &c. (1 *Bur.* 341,) "the insurer, at the time of underwriting, has under his consideration the nature of the voyage, and the usual manner of conducting it. And what is usually done by such a ship, with such a cargo, in such a voyage, is

understood to be referred to by every policy. Hence, when a neutral, carrying on a trade from a belligerent to a neutral country, asks for insurance "for whom it may concern," it is an awakening circumstance. No underwriter can be ignorant of the practice of neutrals to cover belligerent property, under neutral names, or of the precautions ordinarily resorted to, that the cover may escape detection. The cloak must be thrown over the whole transaction, and in no part is it more necessary, than in the correspondence by other vessels, so often overhauled by an enemy, for the very purpose of detecting covers on other cargoes. Letters, thus intercepted, have often been the ground-work of condemnation in Admiralty Courts; and underwriters, to whom the extension of trade is always beneficial, must and do connive at the practice in silence. They ask no questions, propose their premiums, and the contract is as well understood, as the most thorough explanation can make it.

There is nothing in the letter, in evidence, calculated to mislead an insurer of ordinary vigilance, but what was fully explained away, by concomitant circumstances. It is true, that in the letter Fitch writes, to have insurance done *for him*, on "the brig Columbia and her cargo;" that he cannot say, what amount of cargo to have insured *for him*. Yet, when the offer was submitted, it was endorsed on the back of this letter, and expressly declared to be upon the same cargo, of "which you have 6,000 dollars insured, some time since."

The insurance alluded to, was made "for whom it may concern," and this second policy is expressed in the same terms.

Here, then, was a neutral, professing himself to be owner of a cargo, consisting of produce of the hostile island, on a voyage, having for its object, to find a market for that produce—most unnecessarily, if himself the real owner, or if there were no owners, but neutrals—most unwisely, subjecting himself, or them, to an increase of premium, which could not but result from such an offer.

This was a circumstance calculated to induce inquiry. The defendants had a right to make what inquiries they pleased, as to the real character of the cargo; and if they did not make those inquiries, the law imputes to them the use of the phrase, "for whom it may concern," in its ordinary effect and signification. We are, therefore, of opinion, *that this instruction, if so modified as to be confined to the case before the Court*, ought to have been given.

The *second* prayer, amounting only to an affirmance of the general proposition, as relates to the policy of the 6th May, we are of opinion, ought to have been given.

The *third* prayer, having the same bearing upon the policy

of the 24th May, we are of opinion, for the reasons expressed in the first prayer, ought also to have been given.

By the *fifth* prayer, the plaintiffs ask of the Court to instruct the jury, "That if the said Daniel Fitch, at the time of said policies, was legal and equitable owner of part of the cargo insured; and the legal, though not equitable owner of the residue, policies, "for whom it may concern," do cover the entire cargo; and said Fitch is competent, in law, to recover the whole, in his own name—though the belligerent character of a part of said cargo, was not disclosed, at the time of effecting said policies."

The language in which this prayer is couched, obviously imports two propositions: 1st. That a policy, "for whom it may concern," will cover the whole cargo—though the assured had only the *legal*, without the *equitable* interest in part, and a legal and equitable interest in the residue; and, 2d. That *Daniel Fitch* is competent, in law, to recover the whole, in his own name—though the belligerent character of part was not disclosed, when the policies were executed.

It is a very great objection to this prayer, that the language used, is too general and abstracted; and not adapted to the case, with that studied precision which the law requires—thereby rendering it scarcely possible for the Court to meet it with a simple, positive, or affirmative answer.

To the *first* of the two propositions, it may be further objected, that it is difficult to perceive, how it came to be introduced into the cause. Abstracted from the effect of belligerent interest in the cargo, the defence admits, that the policy covers all other interests, whether legal, or equitable.

And, with regard to the *second*, it is not easy to perceive, why the Court should be called upon, to charge the jury, that *Daniel Fitch* was competent, in law, to recover the whole in his own name, when the suit is, in fact, prosecuted in the name of the agents; and they count upon the interests of both Medina and Fitch.

But the cause has been argued, upon the assumption, that this prayer brings up the question of *insurable interest*, in *Fitch*, by whose instructions, Buck & Hedrick effected this insurance; and, as it is better to follow out the concessions of counsel, than to let the cause come up here again, upon this point, we will consider that question as being raised by this, in connexion with the other prayers.

And here, we think, the facts make up a *clear case* of insurable interest. The only doubt, probably, arises from one of the most prolific grounds of uncertainty on many subjects, viz. the use of terms, originally unaptly selected, but now rendered legitimate, by use. It is only necessary to inspect a few cases

on this doctrine, to be satisfied, that the term *interest*, as used in application to the right to insure, does not necessarily imply *property*, in the subject of insurance.

In the case of Crawford et al. *vs.* Hunter, 8 *D.* & *E.* 13, the plaintiffs were commissioners appointed by the Crown, under an Act of Parliament, to superintend the transportation, &c. of Dutch vessels, seized in time of peace, without any present designation for whom—whether to be held in trust, for the original owners, the Crown, or the captor. The vessel had been carried into St. Helena; and the policy was effected, with a view to her safe transportation, from that island, to England; and, after much consideration, it was adjudged, that this was a good insurable interest, and the plaintiffs recovered.

The same point was afterwards decided, in Lucena *vs.* Crawford et al. 3 *Bos. & Pul. 75*, on a writ of error, to the Exchequer, after three arguments, and great deliberation—yet the seizures were made before declaration of war; and the interest of the plaintiffs, amounted to nothing but a power over the subject, with a claim by *quantum meruit*, for their services.

Putting down the present case, therefore, to its lowest grade of insurable interest, it is equal to that of the plaintiffs, in the two cases alluded to—for Daniel Fitch was, at least, the agent or trustee of Medina, to transport his goods from Porto Rico, to a market, and to secure them from the chances of capture and loss.

But this case is stronger than the English cases cited; for, by the act of Medina himself, Fitch was exhibited to the world, clothed with all the national documents, which evidence an absolute property; and, for many purposes, the real owner would have been estopped to deny it.

We will instance the payment of duties; for which, either as owner, or consignee, our laws held Fitch absolutely liable. We have, therefore, no doubt of the sufficiency of the insurable interest, in this case.

The *last* prayer, on which the Court below divided, is in these terms:—

"That the Court instruct the jury, that the letter of the 27th April 1822, with the order written thereon, do not, in law, amount to a representation; that the property to be insured, was the sole property of Daniel Fitch; or that the whole, or any part thereof, was not belligerent."

We have already expressed our opinion, on the proposition here presented. It is to be regretted, that this prayer also, is so defective, in precision. But, it was obviously intended, and so argued, to be confined to a representation, *which would vitiate the policy.* With relation to the *first* policy, we are all of opinion, that it was unaffected, by the letter specified; and,

(Buck & Hedrick vs. The Chesapeake Insurance Company.)

with regard to the *second* policy, whatever might have been the effect of this *letter*, had it stood *alone*—yet, taken in connexion with the concomitant circumstances, it was not fatal to the contract.

On *this point*, a majority of the Court would be understood to express the opinion, that this letter *connected with the order endorsed upon it*, the previous insurance referred to, and, considered in relation to the state of the world, and the nature, character, and ordinary conduct of the voyage insured, was not such a representation, as, *per se*, vitiated the policy.

And this opinion will be certified to the Court below.

This cause came on, &c., on consideration whereof, This Court is of opinion—1. That as the policies of insurance in this cause, purport to insure the plaintiffs "for whom it may concern," they are not bound to prove, that, at the time of effecting the said insurance, or any other time, they disclosed to the defendant that Spanish property was intended to be covered by the said insurance, unless inquiries on the subject were propounded by the insurer, prior to the insurance. 2. That if the jury believe the policy of the 6th of May 1822, was founded on the order of the same date, the said policy being "for whom it may concern," does cover belligerent, as well as neutral interest. 3. That if the jury believe, that the policy dated 24th of May 1822, was founded on the letter of the 27th of April 1822, and the order written thereon, the policy being "for whom it may concern," does cover neutral, as well as belligerent property. 4. That if the said Daniel Fitch, at the time of the date of the said policies, was legal and equitable owner of part of the cargo insured, and legal, though not equitable owner of the residue; the policies being "for whom it may concern," do cover the entire cargo; and that the said Fitch had a good insurable interest in the whole cargo; and the plaintiffs, as his agents, are competent to recover the whole sum insured thereon, on proof of such legal and equitatable interest in the said Fitch. 5. That the letter of the 27th of April 1824, whatever might be its effect if taken alone, yet, taken in connexion with the endorsement thereon, with the previous policy to which it refers, the actual state of the world, &c., and the nature of such transactions, is not such a representation as vitiates the policy. All which is ordered and adjudged by this Court, to be certified to the said Circuit Court.

HENRY WRIGHT, WILLIAM CAROTHERS, ROBERT DENNISTON, WILLIAM PATTON, THOMAS BURMAN, AND JAMES ROBERTSON, PLAINTIFFS IN ERROR, *vs.* THE LESSEE OF LEVI HOLLINGSWORTH, AND JOHN KAIGHN, DEFENDANTS IN ERROR.

In a trial in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, by H. & K., citizens of Pennsylvania; and the other, the demise of B. & G. citizens of Massachusetts. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the Court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri. The parties went to trial without any other pleading; and the jury found for the plaintiff, upon the third, or new count, and a judgment was rendered in his favour.

The allowance and refusal of amendments in the pleadings—the granting and refusing new trials; and most of the other incidental orders, made in the progress of a cause, before trial; are matters so peculiarly addressed to the sound discretion of the Courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This Court has always declined interfering in such cases. {168}

After the filing of a new count to a declaration, the defendant, who to the former counts has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he pleases, abide by his plea already pleaded, and waive his right of pleading, *de novo*. The failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, in the new, as well as in the old counts. {169}

THIS was an action of ejectment, commenced in the Circuit Court for the district of West Tennessee, in 1813; by the lessee of Levi Hollingsworth, and John Kaighn, citizens of the state of Pennsylvania; against Henry Wright, and others, the plaintiffs in error, and citizens of Tennessee. The declaration set forth a demise from Hollingsworth and Kaighn, to John Denn, the defendant in error. A notice was served on the tenants in possession, who, at June term 1813, appeared, and put in the plea of "not guilty." At June term, 1817, after a jury had been sworn in the cause, the plaintiff suffered a *nonsuit;* which was afterwards set aside; and the plaintiff had leave to add a new count to his declaration, upon condition, that all the costs of the term should be paid by him, absolutely; and that he should pay all preceding costs, the same to be refunded, if he should ultimately succeed in the action. A new

count was then filed, in which is stated a lease from *Benjamin Spencer*, a citzen of Missouri. To this count no plea was filed; and, at June term 1825, a trial was had, and a verdict and judgment were rendered for the plaintiff, upon the last count in the declaration.

This writ of error was brought to reverse the judgment.

Mr. White, for the plaintiff in error,—

1. No plea was filed to the additional count in the declaration, upon which the trial was had, nor was there any other issue joined at the trial.

2. The amendment, authorizing a new lessor, ought not to have been allowed.

To the new count in the declaration, which introduced a new lessor, Benjamin Spencer, and stated a demise from him; the defendants were not called upon to plead. The case remained from 1817, when the additional count was filed, until June term 1825, when the trial took place; and the verdict of the jury was upon the new count, and nothing was said upon the former counts in the declaration. The verdict was therefore given, when no issue was joined; and the plea which had been put in originally, could not be applied, without consent or notice to the defendants, to the new count. A new party had been introduced, and the defendants should have been allowed an option, whether they would expose themselves to the expenses of a trial, upon the allegations in the additional count. The jury had not the count stating the demise from Benjamin Spencer, before them, and yet their verdict was upon it, exclusively. *Adams on Ejectment*, 200. 205. 1 *Caines' N. Y. Term. Rep.* 153. 251.

The terms on which the nonsuit was taken off, were, the payment of the costs of the term, absolutely; and of all antecedent costs, which were to be returned, if a verdict should be obtained by the plaintiff in the ejectment. These costs were to depend upon the issue between the then parties; but the verdict in favour of the plaintiff, upon the new count, condemned the defendants to pay the whole costs, upon an issue, not formed at the time the Court took off the nonsuit; and upon the claim of a party, not at that time known to the Court.

It does not appear from the record, that any ground was laid for the amendment, and the Court ought to have been satisfied, before it was allowed; it would have been irregular to allow the amendment without terms.

On the institution of the suit, a *capias ad respondendum*, authorized by the Act of Assembly of Tennessee, was issued, against the tenant in possession, and bail given to secure the damages which might be recovered; and the case stood upon the claims of the then actual parties in the cause.

(Wright et al. vs. The Lessee of Hollingsworth et al.)

A new plaintiff could not be introduced, who could claim the benefit of the bail. 1 *Scott's Revisal of the Laws of Tennessee.*

Mr. Isaacs, for the defendants in error.—

No objections were made to this count, or to the issue at the trial—no allegation of surprise, but the defendants produced, and examined their testimony; and the verdict was given without any exception to the pleadings.

1. It is not necessary that the record should show the grounds on which the Court set aside the nonsuit, and afterwards allowed the amendment; they are stated to have been done after motion, and a rule granted. The law of Tennessee authorizes the Court to allow amendments, beyond the statutes of amendments, and *jeofales*, of England, "provided that the nature of the action shall not be changed; and all causes shall be tried, without being entangled in the nice formalities of pleading." (*Act of Assembly of Tennessee of* 1809, *chap.* 49.) And the Courts of Tennessee have given a most liberal construction to this law.

2. A plea of "not guilty" had been put in, and issue joined upon it. This plea traversed all the facts in the plaintiff's declaration, and made the traverse as broad as possible. The plea put in to the declaration, in its original form, was the proper plea to the new count.

3. It is not claimed, that the bail put in, when the suit was commenced, inured to the benefit of Benjamin Spencer.

Mr. Justice TRIMBLE delivered the opinion of the Court.—

This action of ejectment, was commenced in the Circuit Court, held in East Tennessee, by suing out a writ of *capias ad respondendum*, accompanied with the declaration; and the tenants in possession held to bail, to answer to the action, in the manner provided for by a statute of the state. The original declaration contained two counts; the first, on the demise of Hollingsworth and Kaighn, citizens of Pennsylvania; the second, on the demise of Joseph Blake and Daniel Green, citizens of Massachusetts.

The tenants appeared and pleaded not guilty, upon which issue was joined. A trial was had, and a *nonsuit* suffered by the plaintiff, which was set aside on the payment of costs. After these proceedings, the Court, on the motion of the plaintiff, permitted the declaration to be amended; by adding a count, on the demise of Benjamin Spencer, a citizen of Missouri. The parties went to trial without any other pleadings, and a verdict having been found for the plaintiff, upon the third or new count; judgment was thereon rendered in his favour; to reverse which, the defendants have prosecuted this writ of error.

They alledge the judgment is erroneous and should be reversed.—

(Wright et al. *vs.* The Lessee of Hollingsworth et al.)

1stly. Because, the count on which judgment was rendered against them, does not show that Missouri is one of the United States.

2dly. Because, the Court permitted the declaration to be amended, by adding a new count, on the demise of Benjamin Spencer; and especially as the amendment was permitted with payment of costs.

3dly. Because, no plea was filed to the new count, nor any issue made up thereon.

The first objection was very properly not pressed, in argument. The count alleges Benjamin Spencer to be a citizen of the *state* of Missouri. This count was filed after Missouri was admitted as a state into the Union; and there can be no question but that this, and every other Court in the nation, are bound to take notice of the admission of a state, as one of the United States, without any express averment of the fact.

In support of the second objection, it is urged that the admission of the new count, on the demise of a new lessor, made a material alteration in the suit; that the suit having been originally commenced under the state practice, by writ of *capias ad respondendum*, to which the former lessors only were parties, the amendment was, in substance, and effect, the institution of a new suit, or at least grafting a new one upon the old; and produced an incongruity upon the record; the first and second counts, and the proceedings on them, being proceedings under the statute, and the third or new count, a proceeding at common law; and, that according to established principles of practice, it should have been allowed, if at all, only on payment of costs.

This argument would be entitled to great, and perhaps decisive influence, if addressed to a Court, having any discretion or power over the subject of amendments.

But the allowance and refusal of amendments in the pleadings, the granting or refusing new trials; and indeed, most other incidental orders made in the progress of a cause, before trial; are matters so peculiarly addressed to the sound discretion of the Courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This, it is true, may, occasionally, lead to particular hardships; but on the other hand, the general inconvenience of this Court attempting to revise and correct all the intermediate proceedings in suits, between their commencement and final judgment, would be intolerable. This Court has always declined interfering in such cases; accordingly it was held by the Court in Wood *vs.* Young, 4 *Cranch*, 237; that the refusal of the Court below, to continue a cause, after it is at issue, is not a matter upon which error can be assigned. That the refusal of

the Court below to grant a new trial, is not matter for which a writ of error lies, 5 *Cranch*, 11, 187, and 4 *Wheat.* 220; and that the refusal of the Court below, to allow a plea to be amended, or a new plea to be filed, or to grant a new trial, or to continue a cause, cannot be assigned as a cause of reversal or a writ of error. We can perceive no distinction in principle between these cases, and the one before the Court. We must take the declaration, including the amendment, as we find it on the record. Nor can we interfere, because the Court below did not, as it ought, require the costs formerly accrued, to be paid as a condition of the amendment.

The authorities cited by the learned counsel, do not, we think, support his last position;—that the judgment is erroneous, because a plea was not filed to the new count. They prove, unquestionably, that upon the amendment being made to the declaration, by adding a count, the defendants had a right to plead *de novo;* they prove nothing more. They do not show that the defendants, in such cases, must necessarily plead *de novo;* or that judgment may be entered by default, for want of a plea to the new count, if, before the amendment, he has pleaded the general issue. We think the practice is well settled to the contrary. The defendant has a right, if he will, to withdraw his former plea, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he will, abide by his plea already pleaded, and waive his right of pleading *de novo.* His failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, as is the case in this instance, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new as well as on the old counts.

This is the general doctrine in other forms of action, such as trespass and assumpsit; and we see no reason to distinguish the action of ejectment, or take it out of the general rule.

Judgment affirmed, with costs.

JAMES J. M'LANAHAN, WILHELMUS BOGART, AND JOHN JOSEPH COIRON, PLAINTIFFS IN ERROR, *vs.* THE UNIVERSAL INSURANCE COMPANY, DEFENDANTS IN ERROR.

Insurance. It is, doubtless, within the province of a Court, in the exercise of its discretion, to sum up the facts in the case to the jury; and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But, care must be taken, in all such cases, to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province. {182}

An application for a new trial, on motion after verdict, addresses itself to the sound discretion of the Court; and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial. The application is not a matter of absolute right, but rests in the judgment of the Court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on the trial, by bill of exceptions, to the cognizance of the Appellate Court, the directions of the Court below, must then stand or fall, upon their own intrinsic propriety, as matters of law. {183}

Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. {183}

Seaworthiness in port, or lying in the offing, may be one thing; and seaworthiness for a whole voyage, quite another. {184}

A policy on a ship, "at and from a port," will attach; although the ship be, at the time, undergoing extensive repairs, in port—so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. {184}

What is a competent crew for the voyage—At what time such crew should be on board—What is proper pilot ground—What is the course and usage of trade, in relation to the master and crew being on board, when the ship breaks ground, for the voyage—are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury. {184}

The contract of insurance, is one of mutual good faith; and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. {185}

If a party, knowing that his agent is about to procure insurance for him, withholds information, for the purposes of misleading the underwriter; it is a fraud, and vitiates the insurance. {185}

Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated; for the purpose of countermanding the order, or laying the circumstances before the underwriter. {185}

What constitutes due and reasonable diligence, is a question of fact for the jury. {186}

(M'Lanahan et al. vs. The Universal Insurance Company.)

The accidental concealment of the time of the sailing of a vessel, would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and, whether fraudulent or not, is matter of fact for the jury. {188}

The material ingredients of a question of the *importance* of concealing the time of a vessel's sailing, are mixed up of nautical skill, information, and experience; and are, in no sense, judicially cognizable, as matters of law. It seems, that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad. {188}

Little stress ought to be laid upon general expressions falling from Judges, in the course of trials. Where the facts are not disputed, the Judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognizance of the jury, but rather as an expression of opinion addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole Court. This is so familiarly known, that it needs only to be stated, to be at once admitted. {190}

The question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the Court, as in other cases. The Court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon contested matter of fact, resolving itself into a mere point of law. {191}

THE action, in the Circuit Court for the district of Maryland, was instituted by the plaintiffs in error, on a policy of insurance, in the usual form; and a verdict was rendered for the defendants, under the opinion of the Court, upon the first of nine exceptions, taken by the plaintiffs.

The material facts in the case were.—Insurance was effected in Baltimore, in the name of Thomas Tenant, to the amount of 10,000 dollars, on the brig Creole, for a voyage from Havre de Grace to New-Orleans, with liberty to touch and trade at Havana. *The policy was dated upon the 22d day of December* 1823. The insurance was made for the plaintiffs, the sole owners of the vessel, under the following circumstances:—

John Joseph Coiron, one of the plaintiffs, while at Havre de Grace, on the 19th of October 1823, addressed to Mr. John Stoney, of Charleston, the following letter:—

Havre, October 19th 1823.

Mr. John Stoney, Charleston—

DEAR SIR:—Please to have insured, for my account, for the

account and risk of whom it may concern, ten thousand dollars on the brig Creole, of New-Orleans, Captain Jacob Goodrich, for New-Orleans, touching at the Havana. The brig and boats in the best order, having a round house on deck, containing fourteen births; the crew are seventeen in all. We intend sailing to-morrow. I have with me my family, consisting of two children and two nephews. The wind having shipped round suddenly, I write this in haste; my first will be more satisfactory to you, for particulars. The new Georgia upland cotton, twenty sous; rice, thirty francs.

Your devoted servant and friend,

JOHN JOSEPH COIRON.

And also another letter, as follows:—

Duplicate.

Havre, October 20th 1823.

Mr. John Stoney, Charleston—

DEAR SIR:—I have yesterday requested you to have insured, on my account, for the account of whom it may concern, ten thousand dollars, on the brig Creole, of New-Orleans, Captain Jacob Goodrich, from this port back to New-Orleans, touching at the Havana, the vessel and boats in the best order, having a roof on deck, containing fourteen births, manned by seventeen hands. You know the vessel—I have only to add, that I have made a thousand dollars' worth more of repairs and improvements on her. She is now a very convenient packet. I will feel gratified to hear from you, at the Havana. I intend but making a very short stay there, having two children and two nephews with me, and being anxious to meet Mrs. C., I cannot give you any favourable information respecting business, in this part of Europe.

With the pleasing expectation of being soon near you, I remain, respectfully, dear Sir, your devoted servant and friend,

JOHN JOSEPH COIRON.

This letter was enclosed in another, addressed by Quartier and Drogy, of Havre, to Mr. Stoney, dated 23d of October 1823, and *stamped with the post mark of Savannah, December 10th;* which, with the endorsements thereon, were as follows:—

P. Hesperus.

Havre, October 23d 1823.

John Stoney, Esq., Charleston—

SIR:—We are indebted to our mutual friend, Mr. J. J. Coiron, from whom we beg leave to hand you the enclosed letter, for an introduction to your respectable firm, and should feel

particularly happy, if it became the means of an active correspondence between us; the produce of your country, and particularly cotton, being always of an easy and frequently advantageous sale in this part of France, on account of the vicinity of the metropolis, and the principal manufacturing towns, which gives Havre a decided preference over the other commercial ports of France. Georgia short staple, sells at 27 c. 29, and the stock on hand not considerable, few arrivals being expected, until the new crop, which can hardly reach our market before the month of December. It would, however, not be prudent to speculate on the present prices, as they will be likely to give way, on arrival of the new crop, and occasion considerable losses. Our opinion is, that purchases ought to be made at from 11 to 13*d*, and not to exceed 14*d*, to offer a benefit here.

Should you feel disposed to enter into a connexion of business with us, and honour us with an answer, we could, if you are so inclined, commence with an adventure of a hundred bales of cotton, for mutual account, and successively enlarge the speculation, if the result prove satisfactory. As to the reimbursement for our share, we authorize you to draw on us, at Paris, at sixty or ninety days sight, if the exchange be advantageous; else we may either make you remittance, or open you a credit at New-York. In case it should suit you to speculate for your own account, we beg to offer you the facility of an anticipation of half the amount of the consignments you may please to intrust to our care, on receipt of the bills of lading and order for insurance. We are also ready to offer the same facilities on shipments which you may sway to us, for account of other houses, and to grant you a share in the commission on the same.

Would oblige us to render us the following service, viz:— to procure acceptance of the enclosed bill of 420 dollars, sixty days sight, on Barbet & Esnard, of your city; and, when accepted, to hand the same to Mr. Sam Simon, at Augusta, &c.

Believe us, with due regard, Sir, your most obedient servants,

A. QUARTIER & DROGY.

John Stoney, Esq., Charleston, S. C.

No. 9, 1823.—QUARTIER & DROGY, Havre, Oct. 23.—Received 13th December.

Hesperus.

The letter of the 19th October, was despatched, in a single form, from Havre, on the 20th, by a vessel sailing on that day, for Philadelphia; and was received by Mr. Stoney, on the 15th December—a duplicate of the letter of the 20th, was despatched on the 23d of October, by the Hesperus, via Savannah.

(M'Lanahan et al. vs. The Universal Insurance Company.)

On the 12th of December, 1823, Mr. Stoney applied to the Fire and Marine Insurance Company, and to the Union Insurance Company in Charleston, for insurance on the Creole, and both offices refused the risk, upon the ground that they ought to have received account of the arrival of the brig before that time. The offers were withdrawn, and upon the 13th of December, he wrote to Thomas Tenant Esqr. at Baltimore, the following letter. The letter was post marked at Charleston, on the day of its date; and was received, in Baltimore, by Mr. Tenant, on Saturday, the 20th December, in due course of mail.

Charleston, 13th December, 1823.

THOMAS TENANT Esqr. Baltimore:

DEAR SIR—I received, the day before yesterday, a letter from John Joseph Coiron, via Savannah, (extract annexed,) in which he requests me to have insurance effected on the Creole, on his account, and others, valued at ten thousand dollars, $10,000. The two offices here are afraid of their own shadow, and will not underwrite her. I must, therefore, request the favour of your having the insurance done, agreeable to his order annexed, and I will be answerable to you for the premium, &c. Good upland cotton 14 cents, and declining. I have only to confirm my respects of the 3d inst. which I hope you have received before this. If the insurance cannot be done with you, please write to New-York, to have the same effected.

Expecting the pleasure of hearing from you soon, I am, very respectfully,

Your most obedient servant,

JOHN STONEY.

Duplicate. (Enclosed.)

Havre, 20th of October, 1823.

MR. JOHN STONEY, Charleston:

DEAR SIR—I have yesterday requested you to have insured, on my account, for the account of whom it may concern, ten thousand dollars on the brig Creole, of New-Orleans, Captain Jacob Goodrich, from this port, back to New-Orleans, touching at the Havana. The vessel and boats in the best order, having a roof on deck, round house, containing 14 births, manned by 17 hands; you know the vessel. I have only to add, that I have made one thousand dollars' worth more of repairs and improvements on her. She is, now, a very convenient packet.

Extract Thomas Tenant, Esqr., of Baltimore, Maryland.

No. 1. John Stoney, Charleston, 13th Dec. 1823, and 20th Dec. [mail,] order for insurance.

(M'Lanahan et al. vs. The Universal Insurance Company.)

On the 22d of December, 1823, Mr. Tenant applied to the defendants, the Universal Insurance Company, for insurance, by the following written order for the same; and, upon the contract thus made, the policy was on the same day filled up and executed. "I want insurance, for account whom it may concern, on the brig Creole, Jacob Goodrich master, at and from Havre de Grace to New-Orleans, with liberty to touch and trade at Havana, against all risks—and in case of loss, the same to be paid to me. The vessel valued, independent of freight, to this sum—10,000 dollars.

The Creole was completely rebuilt and coppered at Charleston, S. C. in last summer, at great expense, and is now considered a remarkably fine vessel. She was, and I presume still is, owned by M'Lanahan and Bogart, and J. J. Coiron. The latter gentleman was on board her, and I presume is returning in her to New-Orleans. He writes from Havre, under date of 20th October, but does not say when the brig would sail. She sails under a certificate of ownership. What will be the premium on the above risk?

THOMAS TENANT,
By RICHARD G. COX.

Baltimore, 22d Decr. 1823,
8 per cent.
Accepted. T. Tenant.

On the day the insurance was so made, Mr. Tenant had made application, in the same terms, to the Maryland, Chesapeake, and Baltimore Insurance Companies, all of which declined the risk. The Phœnix Insurance Company, upon application, declined, on the ground that the time of sailing was not ascertained; and the Patapsco Company were willing to take 5000 dollars, at 5 per cent. premium. The insurance effected by Mr. Tenant, was the only one made upon the Creole.

No information relative to the loss of the Creole was received in Charleston, nor was her loss known there, until the 15th *of December;* on which day the brig Panther arrived at Charleston, and about 2 o'clock, Mr. Stoney was informed thereof.

On the 19th *of October*, 1823, by entries in the log book of the Creole, at Havre, it was shown that "the brig was getting ready for sea *on the* 20th; at 9 A. M., the pilot came on board, and warped out into the basin, made sail, hove to in the offing, for the captain, owner, and passengers and crew." At 10 A. M. they came off, and the pilot left the vessel. Tuesday, the 21st October, 1823, the following entry was made in the log book:—

TUESDAY, OCTOBER 21, 1823.

H.	K.	COURSES.	WINDS.	
1	7			Commences with fine breezes and pleasant weather. This day contains 12 hours, ending at noon. At the commencement of the civil account, that at midnight, Cape De Here bore per compass S. S. E. distant five leagues. The detention of Captain on shore, being in want of the national certificate of the owners of this brig, having been carried off by the former captain, Leonard Fash, who was dismissed. It was, therefore, necessary for the present captain to go through the requisite formalities, before the American consul, to prove the want of this important document.
2	7			
3	7			
4	7			
5	7			
6	7			
7	7			
8	7			
9	7			
10	7			
11	7			
12	7			

The protest of Captain Goodrich, master of the Creole, stated that the Creole sailed from the port of Havre de Grace, on the 21st *of October* 1823, bound for Havana in Cuba; that on the 29th of December, the brig was wrecked, and lost on Sugar Key, while on the voyage; and himself, the passengers and crew, were picked up, and some of them carried to New-Orleans, by the ship Trumbull, which ship arrived on the 17th of December 1823. The second mate of the Creole, and five passengers, among whom were Mr. Coiron, and his family, left the ship Trumbull off the Havana, in the small boat of the Creole, and were landed there upon the same day. It also appeared, from the evidence on the part of the defendants, that the *schooner Chase*, Captain Richard S. Pinckney, master, sailed from Havana for Charleston from the 1st *to the third* of December 1823, and arrived at Charleston on the 12th of the same month. Captain Pinckney stated that he did not hear, in Havana, any report of the loss of the Creole. The schooner Eliza and Polly sailed from Havana for Charleston, three hours before the Chase, and Captain Pinckney left Havana to go on board the Chase, three hours after the sailing of the Eliza and Polly.

The following letter from Lemuel Taylor to Mr. Tenant, was also admitted as evidence:

Havre, June 28th 1824.

MY DEAR SIR:—Your favour of the 5th instant was received yesterday; and, in reply, I have only to say, that I left Havana on the 3d of December last, in the schooner Chase,

captain Pinckney, for Charleston; and that, some days previous to my departure from Havana, I see a person land on the wharf, a crowd seemed to get round him, and I see several taking him by the hand; I asked who he was; his name was mentioned, but I do not now recollect it, and that he was passenger in the brig Creole, from Havre, for Havana, and lost on some of the Keys; and that he was an old trader to Havana, from France, and had a large adventure on board. His name, and time of landing, can be ascertained at Havana, if wanted. I never heard the case mentioned on the passage, or in Charleston; and I am sure I never thought or heard of it after leaving Havana, till one day, while in Baltimore, Mr. Parker, speaking of losses, mentioned the Creole; and I observed I heard of her loss, while in Havana; he then observed they should have to refuse to pay the loss, and that it would be one of the most painful disputes he ever had as President, on account of the great respectability of yourself and Mr. Stoney, and mentioned something about dates. From that time, until I received your letter yesterday, I never heard or thought of the case. And I again repeat, that I am sure I did not hear the loss mentioned on the passage, or in Charleston, and that I see the passenger land as mentioned; and that his name and date can be furnished from Havana, if wanted.

I am, dear Sir, very sincerely, your friend and servant,

LEMUEL TAYLOR.

It was also proved, that the northern mail closed in Charleston at ten o'clock in the morning, and generally arrived in Baltimore in seven days, exclusive of the day the letter was mailed, but never at an earlier day; though sometimes in eight or nine days;—that it generally arrived from half past one to two o'clock, and the letters of Mr. Tenant were never delivered by the penny post to him, until after three o'clock, on the day of the arrival of the mail. The hours of business of the insurance companies in Baltimore, terminated, daily, at two o'clock.

The fullest testimony was given of the high character of Mr. Stoney and Col. Tenant, to negative the possibility of a presumption of intentional fraud, or concealment, on the part of either of those gentlemen, relative to the loss of the Creole.

The plaintiff, on the trial, tendered nine exceptions to the opinions of the Circuit Court, all of which are stated on the record; but, as in the opinion of this Court, no notice is taken of any other than the first exception; and the Court justified the refusal of the Judges of the Circuit Court to sign the bill of exceptions to any other than the first, it is deemed necessary to insert the first exception only. That exception is as follows: —"The defendants, by their counsel, prayed the Court to in-

struct the jury, that, upon the whole evidence in the case, the plaintiffs are not entitled to recover, and the verdict of the jury ought to be for the defendants; which instruction and opinion the Court accordingly gave; and thereupon the plaintiffs, by their counsel, prayed leave to except, and that the Court would sign and seal this, their bill of exceptions, which is accordingly done, this 10th day of January 1826.

"G. DUVALL, (Seal.)
"ELIAS GLENN," (Seal.)

The cause was brought by writ of error to this Court; and was argued by Mr. Tawny, and Mr. Jonathan Meredith, for the plaintiffs in error; and by the Attorney General of the United States, and Mr. Ogden, for the defendants.

For the plaintiffs.—Two general grounds of defence were taken at the trial below.—

1. A concealment of material circumstances in effecting the insurance.

2. Want of proper diligence, in not countermanding the order for insurance, after the loss had occurred.

As to concealment.

Four instances of concealment were charged.—

1. The time of the sailing of the brig from Havre.

2. An offer for insurance was made at Charleston, and its rejection.

3. The arrival of the two vessels from Havana at Charleston.

4. The description of the brig in Coiron's letter of 20th October, "she is now a very convenient packet."

As to negligence.

The want of due diligence, in not countermanding the insurance, was charged.—

1. By Coiron, in not communicating the loss to Stoney, while off Havana.

2. By Stoney, in not revoking the order to Tenant, on hearing of the loss on the 15th of December.

The general principle as to the doctrine of concealment is, that the assured is bound to make a full disclosure.

The exceptions are—1. As to facts which the insurer ought to know. 2. What he takes on himself the knowledge of. 3. Which he waives being informed of. 4. Which are not material, as not varying the contract. Carter *vs.* Bochme, 2 *Burr, Rep.*

1. As to the charge of concealment of the time of sailing; Coiron could only state his expectation on this subject.

Coiron was not bound to state a mere expectation of the

(M'Lanahan et al. vs. The Universal Insurance Company.)

time of sailing; because, if he had, it would not have bound him as a representation. *Phill. on Ins.* 83, and cases cited.

There is no general rule on the subject. It depends, like every other species of concealment, on its materiality to the risk, and it was not material here. Foley *vs.* Moline, 5 *Taunt.* 430. 1 *Camp.* 116. Fort *vs.* Lee, 3 *Taunt.* 381. 1 *Marshall*, 483, 484. Mackay *vs.* Rhinelander, 1 *John Cas.* 408. 1 *Sergeant & Lowber*, 144.

The usage in Baltimore, is to calculate the sailing on the day of the last advices in port; which the order in this case stated to be 20th of October. The duty of disclosure is confined to facts, not to the conclusion of other men from the same facts. *Phill.* 100. Bell *vs.* Bell, 2 *Camp.* 479. 1 *Parke, (7th edit.)* 292. Cited, 2 *Dane's Abr.* 121.

The usage in Baltimore corresponds with the legal principle; and that usage may be applied to this case. But if the laws were otherwise, still the question would be, was the alleged concealment material, or was it not, in this case?

2. Concealment, as to arrival of vessels from Havana.

The answers are—1. There is no proof that Mr. Stoney knew of their arrival. 2. Immaterial, because when they left Havana, the Creole could not be considered missing. Littledale *vs.* Dixon, 1 *New. Rep.* 151.

3. Concealment, as to the Creole's being a packet:—

1st. It is not necessary to describe the particular construction of the vessel offered for insurance. Haywood *vs.* Rogers, 4 *East*, 590.

2d. General ground—not countermanding the insurance.

The rule of law is, that if, after an order for insurance, a loss happens, it is the duty of the assured to countermand the order, where there is probable ground to believe, that, by the exercise of reasonable diligence, it will arrive in time. See Fitzherbert *vs.* Mather, 1 *Term Rep.* 12. Watson *vs.* Delafield, 2 *Caines' New-York T. Rep.* 224.

Coiron might fairly have presumed, that one of the three letters, ordering insurance, might have reached Mr. Stoney, long before the loss, particularly the one via Savannah.

The questions in this cause are all unmixed questions of fact, and they were improperly decided by the Court below.

The language of the instruction is peremptory, not by way of advice as to the facts, and was considered as binding on the jury. The question of materiality as to concealment, is always a question exclusively for the jury. 1 *Park*, (*7th edit.*) 289. 301. 314. 317. Hull *vs.* Cooper, 14 *East*, 479. 1 *Maul & Selw.* 16. Littlesdale *vs.* Dixon, 1 *New Rep.* 151. Mackay *vs.* Rhinelander, 1 *John Cases*, 408. Williams *vs.* Delafield, 2

Caines, 329. Fireman Insurance Company *vs.* Walden, 12 *John.* 513, and the cases cited in the opinions of *Ch. Kent.*

A question of due diligence is also a question of fact, 1 *Stark. E.* 412, &c.; and see notes in Moore *vs.* Morgan, *Coup.* 479. Wake *vs.* Atty, 4 *Taunt.* 493. Bateman *vs.* Joseph, 2 *Camp.* 461. Reese *vs.* Rigby, 4 *Barn. & Ald.* 202. Watson *vs.* Delafield, 2 *Caines*, 224.

In reply to the argument of the counsel of the defendants, it was said; the question of seaworthiness is one of fact, and should have been submitted to the jury. As to the casual absence of the Captain, *Phill.* 118.

The brief delay occasioned by the want of a paper, was not material; and was not a deviation to avoid the policy. *Phill. on Ins.* 191, and cases cited. The Court have the right to decide upon the law of the case, but the facts are exclusively for the jury. Nor is it admitted that the Court may advise upon matters of fact, in this case. The Court assumed to determine the facts, and took them entirely from the jury.

The practice under the laws of Maryland, is in conformity to the principles, claimed by the plaintiffs, and the Court are prohibited by law from advising upon the facts. This course of proceeding has not been found inconvenient, nor has it been disapproved of by the people; and it may therefore be considered judicious.

Mr. Wirt, and Mr. Ogden, for the defendants.

The facts of the case justified the opinion of the Court, which is the subject of the first exception: the whole of the case rests upon that exception.

Was the vessel seaworthy, at the time of her departure from Havre? The log book shows, that she got under weigh before the master and crew were on board. At the time of the sailing of the vessel insured, she must be properly manned for the voyage—she must be seaworthy when the voyage commences. *Phill. on Ins.* 117. Cases cited, 3 *Bur.* 1419. 7 *Term R.* 705. 1 *T. Rep.* 343, 186.

2d. There was such a deviation as to discharge the underwriters.

Delay for documents a deviation. 1 *Phill.* 181. 1 *Marsh.* 499.

Upon the first exception, two question present themselves.—

1. Did this Court err in giving the instruction?

2. Did the Court invade the privileges of the jury?

The time of the sailing of the Creole, was not communicated by Coiron, nor did he write, as he ought, and could have done, on his arrival at Havana, after the loss of the brig; and his omission to do this, avoided the policy. *Phill.* 96. 2 *Caines*, 224. 1 *Johns. Rep.* 150. 2 *Johns. Rep.* 526. 9 *Johns. Rep.* 32. Mr. Stoney

should have inquired, at Charleston, of those who arrived from Havana, for information about the Creole.

The Courts of the United States, are not bound by the recent law of Maryland, in reference to the power of Courts to advise or instruct the jury upon facts; the law continues unaffected by the statute. What is concealment, is now become a question of law. *Marshall*, 467. In all cases, when a vessel insured is to sail from abroad, the time of sailing is material.

Upon authorities, this was a case in which the Court had a right to say the insured could not recover. *Phill. on Ins.* 468. 1 *New Rep.* 4. *Marsh.* 470. M'Andrew *vs.* Bell, 70. 1 *Esp.* 371, 407. *Phill.* 104.

It is objected, that the Court took upon themselves to decide the materiality of the fact; and that this, by the law of insurance, is exclusively for the jury.

This is to say, the Court can give no opinion or instruction on the materiality of the facts.

This authority is frequently exercised. 6 *Cranch* 274, 339. 13 *Johns. Rep.* 334. 8 *Mass. Rep.* 336. Questions of fact, on which the law was to be settled, have been taken from the jury. What is notice of non-payment of a bill of exchange, is no longer a question of fact. So questions of abandonment. 6 *Cranch*, 338. Breaking up of a voyage, has become a question of law, "or it may be considered in the chrysalis state, part grub and part butterfly." 6 *Cranch*, 71.

The point now to be settled by this Court, is a question of political jurisprudence; and the Court is called upon, first, to decide and establish a rule for the proceedings of the Courts of the United States; and to say how far these Courts can interfere in questions of fact.

Is the inquiry one which cannot be touched, because the barrier is established, "that the law is for the Court, and the fact is for the jury?"

In England, the same principles prevail, and yet the Courts have broken down this barrier.

It is expedient that Courts should thus interfere—while it is entirely conceded that the preservation of the trial by jury, in *criminal cases*, is essential; in *civil cases*, what would be the trial by jury without the interference of Courts, and "if the law was left to the shifting sands of jury jurisprudence?" It would be "a world without a sun;"—like chaos before the command "Let there be light!"

Mr. Justice Story delivered the opinion of the Court.—

This is a writ of error to the Circuit Court of the district of Maryland. The original action was brought by the plaintiffs in error against the defendants, upon a policy of insurance under-

written by the defendants, whereby "they caused Thomas Tenant, *for whom it may concern*, to be insured, lost or not lost, at and from Havre de Grace to New-Orleans, with *liberty* to touch and trade at Havana;" ten thousand dollars upon brig Creole and appurtenances. The declaration averred the interest in the plaintiffs, and a total loss by the perils of the seas. The defendants pleaded the general issue; and upon the trial, after the whole evidence on both sides had been given in, the Court, upon the prayer of the defendants' counsel, instructed the jury, "that upon *the whole evidence in the case*," as stated; the plaintiffs are not entitled to recover, and the verdict of the jury, "ought to be for the defendants." Nine different instructions were then prayed for on behalf of the plaintiffs, which were all refused by the Court, upon the ground that the opinion already given, disposed of the whole cause upon its merits. If that opinion was correct, this refusal was entirely justifiable; for the Court was under no obligation to discuss or decide other points, when the plaintiffs' case was already shown to possess a fatal defect.

The general question, then, before this Court, is upon the propriety of the instruction so given to the jury.

A suggestion has been thrown out at the bar, that this instruction was not intended to be positive and absolute, but merely advisory to the jury; that it was not meant to take away the right of the jury to decide freely on the facts; but merely to offer for their consideration those views, which the Court had arrived at, and which it might at all times properly suggest to the jury. It is, doubtless, within the province of a Court, in the exercise of its discretion, to sum up the facts in the case to the jury, and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But care should be taken in all such cases, to separate the law from the facts, and to leave the latter, in unequivocal terms, to the jury, as their true and peculiar province. We do not, however, understand that the present instruction was in fact, or was intended to be, merely in the nature of advice to the jury. It is couched in the most absolute terms, and imposed an obligation upon the jury to find a verdict for the defendants. It assumed there were no disputable facts or inferences, proper for the consideration of the jury upon the merits; and that, upon the unquestioned facts, the plaintiffs had no legal right of recovery. It is in this view, that it is open for the consideration of this Court; and in this view, it will now be discussed, as it was discussed in the argument at the bar.

Four grounds have been presented to justify the opinion of the Circuit Court; which, it is said, are apparent from the record itself, and each of them is decisive upon the case. The first is,

(M'Lanahan et al. vs. The Universal Insurance Company.)

the unseaworthiness of the ship, at the time when she broke ground at Havre, and commenced the homeward voyage; by reason of the master and a sufficient crew not being then on board. The second is, the laying off and on, near the port of Havre, after departure on the voyage, for several hours, waiting for the master to come on board; which, it is said, was an improper detention, and amounted to a deviation. The third is, the omission of Coiron to communicate to his agent, or other persons in America, the knowledge of the loss, by the way of Havana; so as to countermand the order of insurance, which it contended was a fatal omission of duty. The fourth is, the omission to mention the time of the vessel's sailing from Havre, in the letter of the 20th October, ordering the insurance; which, whether fraudulent or not, was a material concealment, and misled the underwriters in the same manner, as if there had been a representation that the time of the sailing was uncertain.

It is to be considered that these points do not come before this Court upon a motion for a new trial after verdict, addressing itself to the sound discretion of the Court. In such cases, the whole evidence is examined with minute care, and the inferences which a jury might properly draw from it, are adopted by the Court itself. If, therefore, upon the whole case, justice has been done between the parties, and the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed at the trial. The reason is, that the application is not matter of absolute right in the party, but rests in the judgment of the Court, and is to be granted only when it is in furtherance of substantial justice. The case is far different upon a writ of error, bringing the proceedings at the trial, by a bill of exceptions, to the cognizance of the Appellate Court. The directions of the Court must then stand or fall, upon their own intrinsic propriety, as matters of law.

The first and second points appear to us, in the present case, to resolve themselves into matters of fact; and the facts are too imperfect and too general, to enable the Court to draw any legal conclusion from them, either as to seaworthiness or deviation. There is no doubt, that every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. But how is this Court to arrive at the conclusion, that the brig Creole was not in that predicament at the commencement of the present voyage? The argument assumes, that the ship ought not to have got under weigh, or proceeded into the offing, until the master, and all the crew, necessary, not for that act, but for the entire voyage, were on board. If the law were so, we have no means of ascertaining what crew was ac-

tually on board at the time; nor whether the voyage was absolutely intended to be commenced on that day; nor whether the departure was merely contingent and dependent upon the master's procuring the proper ship's papers, and the breaking ground, and standing off and on in the offing, were preparatory steps, only for this purpose; nor whether for such purposes the pilot and crew on board were not amply sufficient. But we are far from being satisfied that the law has interposed any such positive rule, as the argument supposes. Seaworthiness in port, or for temporary purposes, such as mere change of position in harbour, or proceeding out of port, or lying in the offing, may be one thing; and seaworthiness for a whole voyage, quite another. A policy on a ship, at and from a port, will attach, although the ship be at the time undergoing extensive repairs in port, so as in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. What is a competent crew for the voyage; at what time such crew should be on board; what is proper pilot ground; what is the course and usage of trade in relation to the master and crew being on board, when the ship breaks ground for the voyage; are questions of fact, dependent upon nautical testimony; and are incapable of being solved by a Court, without assuming to itself the province of a jury, and judicially relying on its own skill in maritime affairs. In this view of the point, it is not necessary to rely on the doctrine of Lord Chief Justice Abbott, in Weir *vs.* Aberdeen, (2 *Barn. & Ald.* 320,) which goes the length of asserting, that if there be unseaworthiness at the commencement of the voyage, and the defect is cured before loss, a subsequent loss is recoverable under the policy. This is an important doctrine, and well worthy of discussion, whenever it comes directly in judgment.

The like answer may be given to the point of deviation. This Court cannot intend, that here there was any unnecessary delay in the commencement or course of the voyage. The delay, for the want of papers, may have been entirely justifiable; and indeed may have conduced to an earlier inception of the voyage, by putting the ship in a situation to depart at a moment's warning. The usage of trade may be generally, or at least in that particular part, to get the ship under weigh as in this case, and wait in the offing, until the master is ready to come on board—and that usage may be not only convenient and beneficial to all parties, but absolutely necessary, in given cases, from the nature of the port, and the winds, and seasons. How then can this Court undertake to decide, as matter of law, apparent upon the record, that any delay, admitting of such explanations, amounts to a deviation?

The next point is the omission of Coiron to communicate

information of the loss to his agent, so as to countermand the order for insurance. The contract of insurance has been said to be a contract *uberrimæ fidei*, and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any facts, material to the risk which he does not disclose; and that no known loss had occurred, which by reasonable diligence might have been communicated to him. If a party, having secret information of a loss, procures insurance, without disclosing it, it is a manifest fraud, which avoids the policy. If, knowing that his agent is about to procure insurance, he withholds the same information for the purpose of misleading the underwriter, it is no less a fraud; for under such circumstances, the maxim applies, *qui facit per alium, facit per se.* His own knowledge, in such a case, infects the act of his agent; in the same manner, and to the same extent, which the knowledge of the agent himself would do. And even if there be no intentional fraud, still the underwriter has a right to a disclosure of all material facts, which it was in the power of the party to communicate by ordinary means; and the omission is fatal to the insurance. The true principle deducible from the authorities on this subject is, that where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss; he ought to communicate it to the agent, as soon as, with due and reasonable diligence, it can be communicated, for the purpose of countermanding the order, or laying the circumstances before the underwriter. If he omits so to do, and by due and reasonable diligence the information might have been communicated, so as to have countermanded the insurance, the policy is void. This doctrine is supported by the English as well as the American authorities, and particularly by Watson *vs.* Delafield, (2 1 *John. R.* 152. 2 *Caines' R.* 224. 2 *John. R.* 526;) where most of the early cases are collected, and commented upon; and it is well summed up by Mr. Phillips, in his treatise on insurance, (p. 96.) We do not go over the cases at large, because there is no controversy as to the general result. The only matter for observation is, whether the rule as to diligence, may not, in certain cases, be somewhat more strict, so as to require, what in Andrew *vs.* Marine Insurance Company, (9 *John. R.* 32,) is called "extreme diligence;" or what in Watson *vs.* Delafield is left open for discussion, as extreme diligence; the duty of communication, where the countermand may not only *probably* but *possibly* arrive in season. We think, however, that the principle of the rule requires only due and reasonable diligence, to be judged of under all the circumstances of

each particular case; and that the expressions thrown out in the cases above mentioned, were, not so much intended to point out a stricter rule, as to intimate, that there might be cases, in which a very prompt effort for communication might be fairly deemed not due and reasonable diligence, as where the loss takes place very near the port, at which the insurance is to be made, and the means of communication, by mail or otherwise, are regular or numerous; or where, from the lapse of time, and the date of the order for insurance, the party cannot but feel, that every moment's delay adds many chances in favour of the insurance being made before knowledge of the loss. Under such circumstances, in proportion as the delay would properly give rise to stronger suspicion of intentional concealment, the duty of prompt communication would naturally seem to press upon the party a more vigilant diligence. The case of Wake *vs.* Atty, (4 *Taunton's R.* 494,) lays down no new rule; but merely applies the old one, to circumstances, somewhat nice and peculiar in their presentation.

What constitutes due and reasonable diligence in cases of this nature, is principally matter of fact for the consideration of a jury. When, indeed, all the facts are given, and the inferences deducible therefrom, the question may resolve itself into a mere question of law. But it is, in general, impossible to lay down a fixed rule on the subject, from the almost infinite variety of circumstances which may affect its application; much must depend upon the means of communication, the situation of the parties, the knowledge of conveyances, the fair exercise of discretion, as to time, mode, and place of conveyance, the course of trade, and nature of the voyage, and the probable chances of the countermand being effectual. All these are matters of fit inquiry before the jury, and must, from their very nature, apply with very different force to different cases.

To bring these remarks home to the present case, there are certainly circumstances, which deserve the most careful consideration of a jury upon the point of due diligence. The loss occurred at no given distance from the port of Havana; and if letters had been sent ashore at that port, there is strong reason to believe, that they could have reached Mr. Stoney in time for a countermand, and at all events, if the loss had been made generally public at the Havana, the news might have reached Baltimore before the insurance. But the record does not contain facts enough to establish a want of reasonable diligence on the part of Mr. Coiron. It is no where stated that he was in a situation to make such a communication, or that he knew of the mate and crew being landed, or that vessels were about to depart for the United States from Havana. Nor is it shown, what were the means and facilities of communica-

tion, in the course of trade and voyages, between that port and the United States, regular or irregular, from which we might deduce his knowledge of these means and facilities. Nor is it shown, that the parties contemplated a stoppage off the Havana, so as to put him upon diligence in writing; nor that this mode of conveyance of news was more certain, or quicker than others, which might have been resorted to, in the ordinary course of the voyage of the ship Trumbull, to New-Orleans. We may indeed conjecture how these matters were, by general surmise or personal information; but judicially we can know nothing beyond what the record presents of the facts; yet, all these circumstances must or may be material to the point of due diligence. In their very essence, they are matters of fact, and not conclusions of law.

The opinion, therefore, to which the learned counsel wish to conduct us, that the policy is void, because there has been gross negligence in not countermanding the order for insurance; is one, to which, upon this record, we cannot judicially arrive. It would be assuming the rights and exercising the functions of the jury upon matters not proved, or wholly indeterminate in their own nature. This ground for maintaining the instruction of the Circuit Court, must then be abandoned.

The next point, is the omission in the letter of the 20th October, of any mention of the time of the vessel's sailing. This is put to the Court in a double aspect; first, as the concealment of a material fact, and secondly, connecting the language of the letter with the accompanying circumstances, as a virtual representation that the vessel was not then ready or about to sail on the voyage.

Whether this omission in the letter was merely accidental, or with design to mislead the underwriters; and whether, if so designed, it had the effect, (which, upon the testimony in the case, would be a matter of serious doubt,) it is not now necessary to inquire. If accidental, it would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not in fact mislead; and whether fraudulent or not, was matter of fact for the jury. That there was no virtual representation as to the time of sailing, seems to us conclusively established, by the language of the letter of Colonel Tenant, requesting insurance. He there says "He (Coiron) writes from Havre, under date of the 20th October; but does not say, when the brig would sail." Now, this letter, in direct terms, negatives any intention to represent any particular time of sailing. It leaves the question freely open to the underwriters, either for further inquiry, or for any presumptions most unfavourable to the assured. The natural result ought to be, that the underwriters should calculate the time of sailing as very

near the date of the letter, so as to ask a premium equal to the widest range of risk, from the intermediate lapse of time. The underwriters had no right to presume, that the ship would sail at some future indefinite period, and to bind the assured to that presumption. The letter told them in effect, that the assured would bind themselves to no representation as to the time of sailing; but asked for insurance whenever the ship might sail, be it on that day, or any future day. In this view, the point as to representation vanishes; and the like consideration would, in a great measure, dispose of that of concealment.

But the question, as to this latter point, has been argued at the bar upon much more broad and comprehensive principles; upon which it seems proper for this Court to express an opinion, especially as this case may again undergo the consideration of a jury.

It is admitted, that a concealment, to be fatal to the insurance, must be of facts material to the risk; and, certainly, of this doctrine, there cannot at this time be any legal doubt. It is further admitted, (and so is the unequivocal language of the authorities,) that generally, the materiality of the concealment is a question of fact for the jury. But it is said, that there are exceptions from the rule; and that concealment of the time of sailing belongs to the class of exceptions, and is a question of law for the exclusive decision of the Court. It is necessary to maintain this position in its full extent, to extricate the present case from its pressing difficulties; and if this shall be successfully made out, it will still remain to be decided, whether the facts stated in the record, are sufficient to enable the Court to pronounce the conclusion of law.

That the time of sailing is often very material to the risk, cannot be denied; that it is always so, is a proposition that will scarcely be asserted, and certainly has never yet been successfully maintained. How far it is so, must essentially depend upon the nature and length of the voyage, the season of the year, the prevalence of the winds, the conformation of the coasts, the usages of trade as to navigation, and touching and staying at port, the objects of the enterprise and other circumstances, political and otherwise, which may retard or advance the general progress of the voyage. The material ingredients of all such inquiries, are mixed up with nautical skill, information, and experience; and are to be ascertained in part, upon the testimony of maritime persons, and are in no sense judicially cognizable as matter of law. The ultimate fact itself, which is the test of materiality, that is, whether the risk be increased so as to enhance the premium; is, in many cases, an inquiry dependent upon the judgment of underwriters and others, who are conversant with the subject of insurance. In this very case,

the introduction of testimony was indispensable, to show the usual length of the voyage; and it was quite questionable, whether, in a just sense, the vessel could be deemed a missing vessel, at the time of the insurance. Upon such a point, it would not be a matter of surprise, if different underwriters should arrive at different results. In the nature of the inquiry, then, there is nothing to distinguish the time of sailing of the ship, from any other fact, the representation of concealment of which is supposed to be material to the risk. It must still be resolved into the same element.

It has been said, that there is no case in which the materiality of the time of sailing has been doubted, where the ship was abroad at the time; whether this be so or not, it is not important to ascertain, unless it could be universally affirmed, (which we think it cannot,) that the time of sailing abroad, must always be material to the risk. If it may not always be material, the question, whether it be so in the particular case, is to be decided upon its own circumstances. Indeed, we cannot perceive how the place of sailing, whether from a home or foreign port, can make any difference in the principle. The time of sailing from a home port, may be material to the risk, and if so, the concealment of it will vitiate the policy; but whether material or not, opens the same inquisition into facts, as governs in cases of foreign ports. There may be less intricacy in conducting it, or less difficulty in arriving at a proper conclusion, but it is essentially the same process. The case of Fort *vs.* Lee, (3 *Taunt. R.* 381,) did not proceed upon the ground, that the time of sailing from a home port, was never material to be communicated; but, that under the circumstances of that case, the underwriter, if he wished to know whether the ship had sailed, ought to have made inquiry. It was a mere application to the discretion of the Court to grant a new trial, where the plaintiff had obtained a verdict, and there was no pretence of any misdirection at the trial. In Foley *vs.* Moline, (5 *Taunt.* 145,) the Court said, that there was no pretence for the proposition, as a general rule, that it was necessary to communicate to the underwriters whether the vessels on which an insurance was proposed, had sailed or not. There might be circumstances, that would render that fact highly material; as if the ship were a missing ship, or out of time. So that here, a denial of the proposition now asserted before us, was, in the most explicit terms, avowed and acted on.

Two *nisi prius* cases before Lord Mansfield, have been relied on, to establish the supposed exception to the general rule of cases, relative to the time of the sailing of the ship; in which it is argued, that his lordship undertook to decide the point of materiality, as matter of law, and to give it as a *rule* to the

jury. It is proper to remark, that little stress ought to be laid upon general expressions of this sort, by Judges, in the course of trials. Where the facts are not disputed, the Judge often suggests, in a strong and pointed manner, his opinion as to the materiality of the concealment, and his leading opinion of the conclusion to which facts ought to conduct the jury. This ought not to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognizance of the jury; but rather as an expression of opinion addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole Court. This is so familiarly known, that it needs only to be stated, to be at once admitted. It is with reference to these considerations, that the cases above alluded to should be examined.

The first is Ratcliff *vs.* Shoobred, cited from *Marshall on Insurance, p.* 290. It would certainly seem, at the first view, that Lord Mansfield did decide that concealment was material. But even by Mr. Marshall's report, brief as it is, it by no means appears that the *materiality* was in question at the trial, but only the *effect* of the concealment in avoiding the policy. The same case is reported more fully and more accurately by *Mr. Park on Insurance, p.* 290, where it is perfectly clear, that the point of materiality was left to the jury. "The question is, (said his lordship,) whether this be one of those cases which is affected by misrepresentation or concealment. If the plaintiffs concealed any material part of the information they received, it is a fraud, and the insurers are not liable;" and the jury found a verdict for the defendant, under this direction. So that the point was left fully open to them.

The next case is Fillis *vs.* Berton, cited in *Marshall on Insurance*, 467, and reported also in *Park on Insurance*, 292. The insurance was on a ship from Plymouth to Bristol; and it appeared, that the broker's instructions stated that the ship was ready to sail on the 24th of December, when, in fact, she had sailed on the 23d. Mr. Marshall states, that Lord Mansfield ruled, that this was a material concealment and misrepresentation; but Mr. Park, from whose work the report is professedly taken, uses no such expression. His words are, Lord Mansfield *said* this was a material concealment and misrepresentation; and the jury hesitating, he proceeded to expound to

them the general principles of law on the subject of misrepresentation and concealment; and he seems to have taken it for granted, that the misrepresentation was material, (as from the short duration of such a voyage might naturally be inferred,) and that the only point was, whether the ship had sailed or not. The same explanation disposes of the case of M'Andrews *vs.* Bell, (1 *Esp. Rep.* 373.) Indeed, in any other view, it would be impossible to reconcile these decisions with the judgment pronounced by Lord Mansfield, and other Judges, upon more mature deliberation, when causes have been brought before them in bank. Take, for instance, what fell from the Court upon the motion for a new trial, in M'Dowell *vs.* Praza, (*Doug. R.* 247. 260.) Shirley *vs.* Wilkinson, (*Doug. R.* 236.) Hodgson *vs.* Richardson, (1 *Bl. Rep.* 289.) Littledale *vs.* Dixon, (4 *Bos. & Pul.* 151,) and Hull *vs.* Cooper, (14 *East, R.* 79.) In the case of the Maryland Insurance Company *vs.* Ruden's Administrators, (6 *Cranch*, 338,) this Court expressed the opinion, that "it was well established, that the operation of any concealment on the policy, depends on its materiality to the risk, and that this materiality is a subject for the consideration of a jury." That opinion was acted upon by the Court of Errors of New-York, in the case of the New-York Fireman Insurance Company *vs.* Walden, (12 *John R.* 513;) where Mr. Chancellor Kent, in a very elaborate judgment, reviewed the authorities, and laid down the doctrine in a manner that merits our entire approbation.

We think, then, that the exception insisted upon at the bar, cannot, upon principle or authority, be supported; and that the question of materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the Court, as in other cases. The Court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon a contested matter of fact, resolving itself into a mere point of law. If, indeed, the rule were otherwise, the facts in the record are not so full as to enable the Court to reach the desired conclusion. There is not sufficient matter upon which we could positively say, that the time of sailing was, in this case, necessarily material to the risk.

For these reasons, the judgment of the Circuit Court must be reversed, and the cause remanded, with directions to award a *venire facias ne novo.*

This cause came on, &c., on consideration whereof, It is considered by this Court, that there is error in the opinion of the Circuit Court, given to the jury upon the prayer of the

defendants' counsel;—that upon the whole evidence in the case, as stated in the record, the plaintiffs are not entitled to recover, and that the verdict of the jury ought to be for the defendant; that opinion having withdrawn from the proper consideration of the jury, matters of fact in controversy between the parties.

It is therefore further considered and adjudged, that the judgment of the said Circuit Court, in this case, be, and the same is hereby reversed; and that the cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo.*

CORNELIUS COMEGYS AND ANDREW PETTIT, PLAINTIFFS IN ERROR, *vs.* AMBROSE VASSE, DEFENDANT IN ERROR.

The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May 1819, was to invest the commissioners with full power and authority to receive, examine, and decide upon the *amount* and *validity* of asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow that this authority extends to adjust all conflicting rights, of different citizens, to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, who is the legal or equitable owner of the claim, provided he is an American citizen. {212}

After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands, and those of others, are left to the ordinary course of judicial proceedings, in the established Courts of Justice. {212}

In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, *ad rem* and *in re*; possibilities, coupled with an interest and claim, growing out of, and adhering to property, may pass by assignment. {213}

The law gives to the act of abandonment to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be recovered from destruction. {214}

It is clear, that the right to compensation for damages and injuries, to which citizens of the United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation; passed by abandonment to the underwriters upon property, which had been seized or captured. {215}

The right to indemnity for an unjust capture, on the sovereign; whether remediable in his own Courts, or by his own extraordinary interposition, or grants upon private petition, or upon public negotiation; is a right attached to the ownership of the property itself, and passes by cession to the account of the ultimate sufferer; and is afterwards assignable to the person to whom it had been ceded. {215}

It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a Court of Justice. Claims and debts due by a sovereign, are not commonly capable of being so enforced. It does not follow, that because an unjust sentence cannot be reversed, that the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration. {216}

The treaty with Spain recognised an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity. It was demanded by our government as matter of right, and as such was granted by Spain. {217}

The right to compensation from Spain, held under abandonment made to un-

derwriters, and accepted by them, for damages and injuries, and which were to be satisfied under the treaty, by the United States; passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4, 1800. {219}

THIS case came before the Court, by writ of error to the Circuit Court of Pennsylvania. The defendant in error instituted his suit against the plaintiffs here, who were the surviving assignees, under a commission of bankruptcy, issued against him under the Act of Congress of the United States, for establishing a uniform system of bankruptcy throughout the United States, passed April 5, 1800.

In the Circuit Court, a judgment was entered in favour of the defendant in error, the parties having agreed upon a case, which, if required by either, might be turned into a special verdict, subject to the opinion of the Circuit Court—

The case was: that Ambrose Vasse, previously to the year 1802, was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured and carried into ports of Spain and her dependencies; and abandonments were made thereof to the said Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802.

The said Ambrose Vasse became embarrassed in his affairs, and his creditors proceeded against him as a bankrupt, under the Act of Congress of the United States, for establishing an uniform system of bankruptcy throughout the United States. An assignment was made accordingly, to Jacob Shoemaker, who is since deceased, and the defendants, Cornelius Comegys and Andrew Pettit; who proceeded to take upon themselves the duties of assignees, and have continued to discharge the same. The certificate of discharge of the said Ambrose Vasse, bears date the 28th day of May, 1802.

In the year 1824, the sum of 8846 dollars 14 cents, was received by the defendants from the Treasury of the United States; being the sum awarded by the commissioners sitting at Washington, under the treaty of amity, settlement, and limits, between the United States of America, and his Catholic Majesty, the king of Spain, dated the 22d day of February 1819, on account of the captures and losses aforesaid.

On the 9th day of December 1823, the said Ambrose Vasse filed a bill in equity in the Circuit Court of the District of Columbia, claiming the sum awarded by the commissioners, and a settlement of the accounts of the assignees. This bill was intended to operate upon the funds which were expected to come into the hands of the agent of the assignees, prosecuting for them the claim before the commisioners; but it was not

proceeded on; the said funds having been received by another person.

The said Ambrose Vasse made a return of his effects to the commissioners of bankruptcy. The claim upon Spain for spoliations was not in the schedule; but claims upon France and Great Britain were.

The plaintiffs in error made the following points:

1. That the decree of the commissioners under the Florida treaty, awarding the fund to the assignees of Ambrose Vasse, is conclusive in their favour, and against him.

2. That if the claim on the Spanish government was not legally the subject of assignment, and therefore did not pass under the bankrupt proceedings, to the assignees, it could not pass under the abandonments made to Ambrose Vasse; who claims the fund, not as the original proprietor, but through cessions or assignments of the property made to him as an underwriter.

3. That this claim, as an incident to the property captured and carried into Spanish ports, did pass under the assignment of the bankrupt, and became vested in his assignees.

The case was argued by Mr. J. R. Ingersoll, and Mr. D. B. Ogden, for the plaintiffs in error; and by Mr. Lee, and Mr. C. J. Ingersoll, for the defendant.

For the plaintiffs in error, it was contended,

1. That the commissioners, under the Florida treaty had fixed the relative rights of the parties, by awarding the fund to the assignees, in the face of a claim presented by the bankrupt himself. In deciding thus, they decided, in effect, on the validity and operation of the assignment. The proceeding was not merely *ex parte*, but afforded to the bankrupt an opportunity to exhibit his pretensions; of which he had not failed to avail himself. His act of interposition, was manifested by a bill in equity, filed in the Circuit Court of the District of Columbia, for the county of Washington, in December 1823; in which Ambrose Vasse, the complainant, states the facts now before this Court, and attempts to reach the fund, not (as at present,) *from* the assignees, but *against* the assignees; and to wrest it, not from the commissioners—but from the Treasurer of the United States, who acted under their authority and decrees; and was, accordingly, made a party to the bill. If the commissioners have really decided the point—and, in so doing, they have not exceeded their jurisdiction; no appeal lies to this Court. They acted under a treaty, which is the supreme law of the land; and no other tribunal, however exalted, can reverse, or interfere with their decrees. The bill in equity admits, that Ambrose Vasse never filed the original claim. Hence, it appears, that all the documents in support of it,

were in the possession of his assignees; and they enjoyed this evidence of ownership, at least. It is not, however, necessary, that the award of the commissioners should be conclusive—as the case of the plaintiffs in error, is sufficiently strong upon the other points, which have been decided in the Court below.

2. The argument of the defendant in error, is absolute and unqualified—that the claim which has yielded the fund in controversy, was of a description which *could not be assigned.* That the right to *receive*, did not exist in himself; and, therefore, he could not transfer it to others—that he had nothing to assign—that his hopes rested on the will of an uaccountable, because sovereign power, who might, or might not, realize them—that no legal *remedy* could be pursued; and, without some species of remedy, there can exist no right—that a claim, to be assignable, or even to have existence, means something not ideal, or merely precarious, but substantial. and susceptible of enforcement—not merely to be thought of, but pursued; and, by possibility, to be gained. Admitting, for a moment, both the position and the inference, the shadowy character of the claim, and the impossibility of transferring its ownership,—and where does the defendant in error stand? His right to sue and recover, either from the commissioners, or his assignees, is derived through exactly the same sort of channel, as that of his antagonists. The only difference is, that he claims through a limited and partial assignment; and they through a general and all-comprehensive one. He was not the original owner. He was an underwriter, merely, on the property lost; and, when he paid the losses, he received the assignments, without an idea, that, at a distant day, this would be the shape in which they would develop themselves. He made his assignment, when every thing was entirely unchanged. If all the representative interests are to be disregarded, and the political bounty is to enure to the first proprietor; then we are accountable, not to Ambrose Vasse, the underwriter—but to the original proprietors themselves. If the opposite argument be sound, neither of these parties is entitled to the money; and then, *potior est conditio defendentis.*

Nor does the defendant in error, injudiciously concede any thing, in the position which he assumes. He has no standing without it. Whatever he had, in the shape of property, passed by the bankruptcy. His only refuge, is in the suggestion, that there was nothing, in the shape of property, to pass; and then, he is unhappily landed here—that being himself a claimant of it, as property, because under an assignment—the same argument applies with equal force to himself; and he is exactly as badly situated, as his opponents.

The bankrupt thought the claim passed by the assignment, and intended that it should—for claims of a similar character, upon the French and British governments, are stated among his effects, in the schedule laid before the commissioners. This, upon the government of Spain, was omitted—probably, because it was regarded as desperate, not being then included in any treaty.

3. There was a clear property *to be* assigned; and it *was* assigned by the original owners to the underwriter, and by the underwriter to his assignees.

1. Independently of all questions growing out of mere bankruptcy.—This was, in its nature, peculiarly the subject of assignment. In matters of insurance, there was a time, when nearly every transfer consisted of a claim on a foreign government. No neutral vessel could, with safety, navigate the ocean. The attempt led, in instances innumerable, to capture and condemnation. Insurances were resorted to, at any rate of premium, however extravagant; and the little chance of hope of redress, or indemnity, to which the underwriters succeeded, was to be gathered from the sense of justice of these ruthless belligerents. Hence, transfers of these claims, were of perpetual occurrence. Not only were the transfers made, and deemed worthy of acceptance—but our American Courts of Justice would permit no recovery from the insurers, until a cession had been actually made. Brown *vs.* Phœnix Ins. Co. 4 *Binn.* 45. Rhinelander *vs.* Penn. Ins. Co. 4 *Cranch*, 42. Not only this; the time when abandoment cannot be made, is after restitution—when the opposite argument supposes the right only begins. Adams *vs.* The Del. Ins. Co. 3 *Binn.* 287. Marshall *vs.* The Del. Ins. Co. 4 *Cranch*, 202.

The claims on Denmark, France, England, Naples, and Holland, comprise, agreeably to a sober estimate, seventeen millions of dollars, of American capital, locked up in the coffers of foreign potentates; and, long since, for the most part, reimbursed to the original proprietors, and resting on the insurance offices, to an immense extent.

Why is it, that a policy always stipulates, that the insured shall sue, labour, &c. after capture, and even after condemnation; if the one party be requiring, and the other undertaking a wild, preposterous, and despairing pursuit? It is the *spes recuperandi*—the incident to the property, or substitute for it, which is transferred, in whatever shape it may, at a distant day, present itself; although the transfer may be in form of the property itself. A thing need not be in possession, to be transferred. It may be on the other side of the globe. It need not even have actual existence, to be the subject of a legal contract of transfer, or sale. A ship out of time—the hope, or

chance of redemption, is sold in good faith. It appears, afterwards, that she was, at the time, consumed by fire, or at the bottom of the sea. Yet the contract was good.

2. As a matter of bankruptcy concern, and to be regulated by the principles of bankrupt laws.

The treaty itself says not a word, as to the *person* by whom the restored property, or its substitute, is to be received. It merely provides and awards the fund; but whether for the original owner, or underwriter, or assignee, is submitted to the general principles of established law. If it had provided, *eo nomine*, for the bankrupt, then it might, indeed, have been considered a solace for his general misfortunes, derived from a kind but ill-judged policy; and the political bounty, (as it would then really be,) would, perhaps, flow exactly where it was directed. But the argument, founded upon the idea of political bounty, is defective, when it attempts, on that ground, to give the fund to the bankrupt; since the treaty leaves that point, viz. the individual object of its kindness, entirely undefined. In the concatenation of inferences, one essential link is wanting; namely, that the particular individual is to be reimbursed. But why should the underwriter be preferred? He is not the original sufferer, whose feelings are to be assuaged; nor the final loser, whose pecuniary injuries are to be redressed. Had the violation of neutrality, which is remedied by the treaty, never occurred, the property would have remained with the *insured*. As it is, the underwriter has paid the loss, but he has done it with the money of his creditors; and hence the *deficit*, manifested in his bankruptcy. The real losers, then, on principle, have the fairest claim to redress.

As to the propriety of adopting bankrupt laws, there may be differences of opinion; but with respect to their object, policy, and true application, when established, there can be none. They are not technical, but substantial. If they give relief from present difficulties, and hope and energy to future exertions, it is in consequence of entire renunciation of all benefit from the past. If ingenuity could discover means by which debtors, notwithstanding their seeming surrender of all, could still retain a lurking interest, which deprives the creditor of his expected consolation; it would not be surprising that bankrupt laws should be for ever discountenanced by legislative opposition, and that one general mercantile community should continue under the influence of a multitude of heterogeneous insolvent systems, feeble in their protection of the debtor, and worse than useless to the creditor.

It were extraordinary, indeed, if the effect of bankruptcy were to protect previously acquired property. But for his certificate, execution might be levied, attachment might reach the

fund, the wit of man could not elude the scrutiny of the law. Yet, the bankruptcy, which is designed to facilitate the assertion of these rights, if the present effort succeeds, would take them all away.

The moment one becomes a bankrupt, a clear line is drawn between what is his, and what is his creditors'. The faculties which God and nature have given him, the disposition to labour, and the capacity for exertion of mind and body, are his own, inalienably, and nothing can deprive him of them. Even the personal claims to redress for bodily wrongs, which grow out of his person, and not out of his creditors' property, remain. But results arising from the investments of property, whether voluntarily or involuntarily made, however, or whenever to arise, tracing their origin to previous possessions, are to return to those with whom they originated, and who did but advance them. Hence, all the limitations to the transfer by bankruptcy, are reducible to three classes.—

1. Such as may never happen, being not merely future in their actual existence, but dependent for *any*, even a prospective existence, upon events which, perhaps, never may occur.

Of this description, are an heir apparent's pretensions. Moth *vs.* Frome, *Ambler*, 394. A pension to a soldier, who may die the moment after bankruptcy. Pay to an officer. Legacy to a bankrupt's wife, on the contingency of her surviving another person. Krumbhaar *vs.* Burt, 2 *Wash. C. C. Rep.* 406.

2. The lien of a tradesman, who has done work to a vessel. Shoemaker *vs.* Norris, 3 *Yeates*, 392.

3. *Torts* which require an action in a personal form. Shoemaker *vs.* Keeley, 1 *Yeates*, 245. Benson *vs.* Flower, *Sir T. Jones*, 215.

This is confined to mere personal wrongs, not growing out of property, for there the assignees take, even though the injury be accompanied with violence. *Eden's B. L.* 235.

Whatever does not come within one of these three exceptions, passes. Hence, almost every possible variety is to be found in the English cases, which are frequent, because of a continuance of bankrupt laws for a long series of years. 1 *Cook B. L.* 290. 365. 3 *T. R.* 88. 2 *Vern.* 432. 19 *Vez.* 432.

It was decided in England, nearly a century ago, that the insurer had the plainest equity in the world, to claim the proceeds of prizes taken under letters of reprisal, after they had paid the original owners. Randal *vs.* Cochran, 1 *Vez. Sen.* 98. The bankrupt law of the United States, makes express provision for the transfer of equitable, as well as legal interests. Chief Justice Kent recognises our principle, in its largest extent, as to the substitute for the property, while he asserts that

there was no existing hope of recovery, as to the property itself. Gracie *vs.* N. Y. Ins. Co. 8 *Johns.* 245.

The bankrupt law of the United States, in principle and policy, is the same with the British statutes on the subject. In terms, so far as it applies to the present object, there is no difference. The deficiency is supposed to exist—

1. In the absence of the phrase of the statute, (13 *Eliz.* c. 7.) giving to the commissioners power "over all such interest in lands, as the bankrupt may lawfully depart withall."

But this leaves the question exactly where it found it; as we are upon the very inquiry whether this be such a thing as he may lawfully depart withall. And it is more than doubtful, whether the phrase would apply to the kind of interests now in contemplation.

2. In the supposed non-application of the 18th section, which contains the words *possibilities of profits*. It is supposed that this clause is introduced, not for the purpose of conveying the thing contemplated, but merely to discover any thing which may fall in prior to the certificate.

It is apprehended that there could be no object in a discovery, except to transfer; and it matters not whether the transfer is made while the object is remote, or is deferred until beneficial possession can accompany the conveyance. And any thing falling in, would become property; and under that name, must then and at all times be disclosed.

3. In the absence of the general expression in the statute, 6 *Geo.* 4, c. 16. "That this act shall be construed beneficially for creditors."

That provision is not necessary for the present object, which is attained by a construction founded on the mere ordinary and inherent policy of a bankrupt system. The result is reached by Lord Chief Justice Dallas, in an opinion delivered at Hilary Term, 59 *Geo.* 3, several years before the statute referred to, had any existence. Clark *vs.* Calvert, 8 *Taunt.* 742.

Bankrupt laws are supposed to place the assignees in the room of the bankrupt, in the "same situation," without reserve. Cassell *vs.* Carroll, 11 *Wheat.* 152.

The interest in question, however, is plainly to be distinguished from a mere possibility; which is "an uncertain thing that may or may not happen." 2 *Lill. Abr.* 336.

An heir presumptive or apparent, may have an expectation, but no right; for, the ancestor may outlive him, or otherwise dispose of the inheritance. Hence, an heir apparent may be a witness, to prove the title to land, but a remainder-man cannot, Smith *vs.* Blackham, (1 *Salk.* 283.) A reversion absolute is thus a very different thing. Hence, we speak of the possibility of a reverter which cannot be assigned, just as we do of

the possibility of a possession which can.—Lord Mansfield, in the argument reported 11 *Wheat.* 168, on the Maryland charter. A debt barred by the Act of Limitations, bankruptcy, or, perhaps, alienage—a debt of a foreign minister, infant, or married woman, are not mere possibilities; although the remedies are at least as defective, and apparently inaccessible, as the one in question. The justice of a claim, and its assignable properties, are totally distinct, both from the question of its present or future character, and from the nature and even existence of a remedy. The assignable character of a thing depends on nothing technical, or *choses in action* would not pass. But upon the existence of right, abstracted from the consideration of present or future enforcement, or the susceptibility of enforcement at all, from the possible want of a precise remedy. Can there be a plainer proposition than this?—that he who unjustly takes my property from me, ought to restore it—in other words, that I ought to have it. And the union of my title to have, with his duty to restore, constitutes a rightful claim. The immediate wrongdoers, are the individuals who committed the depredations on American commerce. The sovereign assumed the discharge of these obligations; and it is in pursuance of that assumption, that the money is paid.

The right might possibly be deficient, as regarded a specific remedy, and yet be a right still; one, susceptible of being owned and transferred, though not advantageously used. But *this right* is perfect in itself, and is attended with a corresponding remedy. The error which lies at the root of the opposite suggestion, consists in attaching a meaning too narrow and technical to the term remedy. In a judicial Court of justice, as our Courts are organized, perhaps there is none. The division, however, into executive, judiciary, and legislative departments of government, is not universal. If, as it may be, the sovereign is the interpreter, as well as framer of the law; that is, if instead of three branches, there be but one, or rather instead of their being separate, they are united; why is not an appeal as likely to succeed when made to the supreme authority, as if made to what is usually a subordinate department? At no very distant period of British history, the king himself actually attended in person in the Courts of Justice. He is still, in contemplation of law, present, *in aula regis.* But if the separation be entire, and judicial remedy be inaccessible, all being referred to the supreme power alone; this merely reduces the difference between us, not to a question of remedy or no remedy, but the kind or quality of the remedy, whether judicial or executive. If this be the narrow line of separation, and so it is, at the worst, surely you cannot pronounce the one every thing, the other nothing—less than nothing; that, a perfect, absolute, and

recoverable right; this, a shadowy nonentity—a phantom—something "less even than a hope."

On the contrary, it is a fundamental rule of presumption, that sovereigns will do justice voluntarily. It is the basis of international law. Hence, the broad line between barbarous and civilized states. What sovereign of a civilized community ever ventured to say, "he acknowledged no law but his own will, and set at defiance all remedy but that of force?" There are laws among nations, just as well defined, and about as little liable to be broken, as those of particular municipalities. An American officer is understood to have applied for, and obtained, compensation, from the British government. An American citizen very recently made similar application, with similar success, to the sovereign of France.

But it is more than presumption, that governments will do justice. It may be, and often is, *enforced.* They are compellable, by a code which is as effectual in its sanctions, as it is clear in its dictates. Municipal law is sometimes interfered with, by limitations, tenders, and reliefs; but contracts and rights are not, therefore, extinguished. There are places where there is no law. In China, strangers are altogether without the means of redress. Every one, with regard to them, is, whether native or sojourner, really irresponsible, and acknowledges not even the law of force. Yet bargains are made, and transfers are executed there, every day, which are respected and even enforced here. If one steal my property, and take refuge in the suburbs of Canton, does it cease to be my property?—may I not retain or assign the ownership, notwithstanding the inaccessibility of the thing itself? Principles are established by authority and precedent, which go the whole length of the case. The decision below assumes the broad ground, that there was no right, either in Ambrose Vasse or his assignees, or the original owners; that "it is a mere expectancy, but without hope, because without right, even a contingent one." Elementary writers on the law of nations, maintain very different principles, *Grotius, b.* 3. *ch.* 2. *sec.* 5. 2 *Ruth.* 568–9–570. Conformably to these principles, a decision was pronounced by the commissioners, under the 7th article of the British Treaty, in the case of the Betsey, Furlong master, *Wheaton's Life of Pinckney,* 193, *&c.* The newly established Republic of Colombia, has set a noble example of deference for these doctrines, by reimbursing to the sufferers from depredations by their cruisers, the whole loss and interest, and fifty per cent. damages besides.

The best securities by which the hold on property is maintained, are claims on sovereign powers. Government stock, treasury notes, exchequer bills, are all of this description. Yet

where is the citizen that does not gladly exchange all the steadfast earth-bound property he has, and invest it in this more beneficial and productive possession? Trover and trespass may be maintained for it, contracts may be made with regard to it, transfers may take place of it—in short, there is no criterion of property or ownership, that may not be applied to what is regarded as having no substantial existence. A bond given by the King of Prussia, declaring himself and his successors bound to the holder, was held to pass as property by delivery; Gorgier *vs.* Mieville, 3 *Bam. & Cres.* 45. Yet where was the judicial remedy, if the crowned obligor had refused payment? Even criminal jurisprudence gives its sanction and assent to these principles. The forgery of a Prussian treasury note, is within the statute, 43 Geo. 3. c. 139. sec. 1. Rex *vs.* Manasseh Goldstein, 3 *Brod. & B.* 201.

The decrees of a foreign government are firm and irreversible, only with regard to the thing. A host of decisions, from Hughes and Cornelius, (2 *Shower*, 242,) down to Williams *vs.* Armroyd, (7 *Cranch*, 423,) and even the Apollon Eden claimant, (9 *Wheat.* 302,) confirm this principle, but go no farther. It required a constitutional provision to render adjudications and decrees conclusive throughout—even among sister states. Redress, (if the thing itself be passed away,) is substituted in some other shape, where wrong has been done by the decree; and it is the more necessary, in proportion to the efficacy and conclusiveness of the sentence by which the specific property has been irrevocably withdrawn. The cases provided for by treaty, were not necessarily, or in point of fact generally, of judicial condemnation and decree. They were of mere forcible abduction—and placing the ships and cargoes, tortiously, *infra præsidia*, for which indemnity is provided, not by restoring the thing, but substituting pecuniary compensation.

If the claim were originally nothing, yet when it became substantial, as it did at last, by the interposition of the government of the United States; it has relation back to the former time, and makes the whole available *ab initio*.

For the defendant.

The case states that the money was paid from the treasury, for losses provided for by the Florida treaty; but it does not state, to whom, or for whom, it was paid. The commissioners awarded nothing to Vasse's assignees, but, as is believed, to certain insurers, who claimed the funds. No doubt their award is conclusive on its subject matter, which is the amount and validity of the claims. By the eleventh section, they were to receive, examine, and decide upon such amount and validity. By the second clause, they were to adjust claims. But they had no judicial function, process, or power. They were a

board or inquest, to ascertain the sum of claims, and certify it to the treasury for payment. But parties could not litigate claims before the commission, which had no faculties of a judicial character. Neither of the parties to this suit were before that commission, which did not pretend to settle to whom, but only how much should be allowed to any ostensible claimant; leaving it to the ordinary tribunals to determine between disputants. It would be contrary to all principles, to extend, by construction, the powers of such an extraordinary Court. In Campbell *vs.* Mullett, (2 *Swanst.* 579,) the three parties before the board did not each and all claim the same fund, but each his several share of it. There was no conflict of parties before the commissioners; but as the French partner was an alien enemy, his claim to part was rejected on that ground. In Randal *vs.* Cochran, (1 *Vez. sen.* 98,) Lord Hardwicke rectified a judgment of commissioners appointed to distribute prize money; and the Vice Chancellor, in the case in 2 *Swanston*, does not ascribe to the commissioners exclusive jurisdiction, except in their unquestionable province. Any person receiving money by award of the commissioners, under the Florida treaty, holds it as money had and received to the use of all and any other persons capable of proving a right to it, or any part of it, by means of suit at law, or in equity.

The main question may be considered, first, by the light of the common law; secondly, by that of the English bankrupt acts and adjudications; thirdly, by our own.

The commissioners' assignment to the assignees, is of estate and effects, claims and demands. The money in dispute was paid as indemnity for unlawful seizures; art. 9 of the treaty—Laws of the U. S. vol. 6. 620. Vasse's certificate was signed in 1802. Of consequence, there was no indemnity till twenty years afterwards. Whatever it may be, it is certain that it was not specifically assigned, nor is it alluded to in the inventory of his property. If it passed, therefore, it must have been by mere operation of law, without intention of parties; for neither bankrupts, commissioners, nor assignees, appear to have adverted to it at all. Vasse's claims for English and French spoliations, are mentioned, because they operated on his own property as a merchant. But whatever claims, if any he had, as an insurer, by virtue of losses made good by him to other merchants, are no where specified in the bankruptcy proceedings. From Vasse or from the commissioners, the assignees acquired no apparent title. Whatever their right is to hold the fund they have got, must be shown independently of their title papers, which are altogther silent on the subject.

First: All the analogies from the common law are against it. By that, even a *chose in action* cannot be assigned, nor

any possibility or contingency, unless coupled with an interest, or in equity. 2 *Black. Com.* 293. 1 *Com. Dig.* 696–7. Assignment, C. 1, 2, 3. *Shep. Touch.* 239–40. 322. 11 *Mod.* 152—Archer *vs.* Bokenham. 1 *P. Wms.* 574, Wind *vs.* Jekyl. 1 *Stra.* 132, Marks *vs.* Marks. This, however, was not even a *chose in action.* It is questionable whether Vasse could assign it himself. Yet the argument is, that the law assigned it by constructive operation. But it is contended, that as it was assigned to him, it might be assigned by or from him. That argument confounds specific cession with the constructive assignment, inferred from operation of law. The merchants whom Vasse indemnified for losses by captures, abandoned and ceded to him specifically the *corpus* and the *spes recuperandi.* Indeed, neither abandonment nor cession is necessary; payment after total loss, acquires the title transferred, without either. 8 *Johns.* 237—Gracie *vs.* The New-York Insurance Company. But the postulate here is, that by construction of the Act of Bankruptcy, this sovereign boon was transferred by Vasse to the commissioners, and by them to the assignees, without any specific or intended assignment of it, twenty years before it had existence—that such was the intention of the legislaure in forming the Bankrupt Act. If so, certainly all the familiar doctrines of the common law were overlooked by them.

2dly. It may be granted, that by the English statutes of Elizabeth, James, and George, concerning bankruptcy, and their various adjudications, all property and interest pass by bankrupt assignment. I agree to the language of Ch. J. Dallas, as quoted from 8 *Taunt.* 742—every beneficial interest. But then, it must be what the law recognises as such, not every popular or vulgar notion of right or claim. In 2 *Com. Dig.* 112, title Bankruptcy, note m., the cases are collected, and the principles of exception will be found as well adjudged as those of general rule. After the extensive provisions of the statutes of Elizabeth and James, in 1732, came the *Stat.* 5 *Geo.* 2, *ch.* 32, enlarging and consolidating the system; and superadding the phrase *possibility of profits.* The late consolidating Act of 1825, 5 *Geo.* 4, *ch.* 16, omits that phrase, but retains the legislative injunction, which pervades and characterizes the English system, to construe all the statutes largely and liberally for creditors. Thus enjoined, the Courts have gone great lengths in administering the policy of the bankrupt laws. In exchange for personal liberation, they have required the surrender of all convertible property. But they have never taken any thing which the bankrupt himself realizes after certificate, nor any mere damage demand, though suable before certificate. Now the fund in question, was a demand, if any thing, for damages for

torts, and realized long after certificate. The English system goes no further than estate and effects, whether goods in possession, debts, contracts, or *choses in action*, says *Blackstone*, 2 vol. 484. The Act of George IV. consolidating all its predecessors, is also limited to estate, goods, chattels, debts, and the like. *Eden. App.* 25. Not a word of it applies to any thing but tangible property, for which there is right of action, and right of action is nothing less than right of possession. 6 *T. R.* 684. Dommett *vs.* Bedford. According to the latest and most eminent English authorities, mere possibilities are not deviseable, nor do they pass to assignees under a commission of bankruptcy. *Preston on Estates* 75–6. *Preston on Abstracts of Titles* 93–5, 254. The whole tenor of the argument of the Master of the Rolls, in the case of Campbell *vs.* Mullet, 2 *Swanst.* 551, is to the same effect, in a case remarkably similar. The question there turned on partnership, it is true; but the reasons submitted in behalf of Vasse, are precisely those of the Master of the Rolls, whose decision is quoted as authority, in *Gow on Part.* 315–16. What possible construction of the English bankrupt law, can be drawn to a different result? The hope in question is not a thing at all, much less a *chose in action*. No right of action followed it. Possession of it was impracticable. No remedy would reach it. The standard of remedy, is the true judicial test of right. To say that this is but a question of the kind of remedy, is a mere argument of terms; for who can sue a sovereign? If the claim cannot be made in and through a Court of justice, it is no claim. Even the political right, if it exist, to petition or complain to executive government, is not a right that can be classed with legal rights or claims. A mere possibility is an uncertain thing. 2 *Lil. Abr.* 343. But the hope of indemnity from a foreign sovereign, is the merest possibility imaginable. The English exceptions are—1. Damages for *torts* or slander. *Sir W. Jones*, 215. Benson *vs.* Flower. 2. All unliquidated damages. *Doug.* 562. Goodtitle *vs.* North. 6 *T. R.* 489. Banister *vs.* Scot. 7 *T. R.* 612. Hammond *vs.* Toulmin. 3. Any mere course of action. 8 *Vez.* 335, *ex parte mure.* 3 *Wils.* 270. Goddard *vs.* Vanderheyden. See also, 1 *Barn. & Ald.* 491. Overseers of St. Martin *vs.* Warren. 3 *Bingh.* 154. Davies *vs.* Arnott. In Watson *vs.* The Ins. Co. of N. A., 1 *Binn.* 47, it was left to a jury to estimate a *spes recuperandi*. But in Gracie *vs.* The New-York Ins. Co., 8 *Johns.* 237, this proceeding is treated as preposterous. A fourth class of cases in England, concerns the pay of public officers, which never passes by bankrupt assignment, on principles of public policy. The doctrine of possibility of interest, is settled to mean a legal or practicable possibility, 3 *P. Wms.* 132, Higden *vs.* Williamson. Not any or every possibility, *id.* 385, Jacobson *vs.* Williamson.

Ambl. 394. North *vs.* Frome, 3 *Merw.* 671. Carleton *vs.* Leighton. Chandler *vs.* Gardner, cited in 17 *Vez.* 338–343. Crutwell *vs.* Lye. It is not by the force of the phrase, that possibility of interest becomes so comprehensive a provision in the English bankrupt acts, but by their injunction on the Courts to construe them largely. If Vasse, after assignment, and before certificate, had sued for slander, or personal trespass, the assignees would have no right, according to the English law, to whatever he recovered after certificate. Now, the indemnity in question, which could not be sued for, was not awarded till after certificate, and then for *torts ex delicto*. Not a case from the English codes can be cited, nor a principle, which sanctions the assertion, that any mere possibility would pass under such circumstances. All the cases referred to in the opposite argument, are of possibilities coupled with interest, and in some of them, the exception now contended for, is strongly put. 3 *T. R.* 88, Jones *vs.* Roe. No English authority can be vouched by the assignees, while the case in 2 *Swanston*, the authority of Mr. Preston, and the analogies of all their established exceptions to the general rule, concur in the conclusion, that such a possibility as that in question, would not be taken by a commissioner's assignment, under the Acts of bankruptcy in England.

3dly. But the American law differs materially from the English, on this subject. Bankruptcy, in England, is a long established system, matured and formed by the legislature, and sustained by the judiciary. In this country, it had but a short-lived existence; has never been a public favourite, and the Courts have no impulse from statutes to extend it by construction. The whole question is, what is the true interpretation of the Act of Congress of 1800. 3 *vol. Laws of U. S.* 320. The 5th, 6th, 13th and 14th sections, are all that regulate assignments, and they each and all, uniformly contemplate property that may be realized. By the 5th, the commissioners are to take possession of the property, and deliver the effects to the assignees. By the 6th, estate and effects are to be assigned; and the 13th provides for the bankrupt's debts to be recovered. The 14th, directs the assignees to recover his property, goods, chattels, and debts. The 13th, does, indeed, mention claims, but it characterizes them as such as are suable, attachable, and recoverable by legal process. The only debateable section is the 18th. All the rest exclude every idea of possibility, contingency, damages, or the like. They uniformly treat of tangible property, and nothing else. The 15th section, copied from the first section of the statute 5 *Geo.* 2, provides for disclosure of every possibility of profit. But that provision is confined to the discovery of the bankrupt's interests. The same

section, when it comes to provide for their assignment, returns to the word estate. The intent was to eviscerate *ex seipso* an account of every thing that may be realized: but not comprehending personal demands for *torts* and damages.

This is clear from the 50th section, which provides for contingencies falling due before certificate; a superfluous provision if the 18th section had already provided for them. These sections would be in conflict otherwise. But the meaning of this voluminous Act is not to be taken from any detailed section. What may be called its code, is to be found in the whole taken together. The 26th section, allowing a premium for the discovery of estate; the 29th section, compelling assignees to exhibit accounts of estate and effects; the 32d section, directing them to keep books of receipts from estate; the 34th section, authorizing them to sell the estate at auction; the 53d section, making an allowance for support out of the estate; and the 54th section, directing a deposite of the money proceeding from the estate; all these sections are to be taken with the 5th, 6th, 13th, and 14th sections, already analysed, and altogether demonstrate, beyond doubt, that property, such as may be possessed, sued for, and recovered, taken into possession, and turned to account, was intended to pass by commissioners' assignment, but never any mere contingencies, with which no interest is coupled. By capture and *deductio infra præsidia*, the property insured and paid for by Vasse, was lost entirely. No lawful reclamation for it remained. The sufferer was the original owner, by whose cession both *res* and *spes* were transferred to Vasse, when he paid for the losses. But this transfer conveyed to him no *chose in action*, because there can be none, without a right of action, for there is no such thing as right, without legal remedy. 3 *Black. Com.* 123. No interest existed in Vasse, because he had no right—no claim, because a claim is a demand for a thing out of possession. Here was no *jus prosequendi*, or *standi in judicio*; no demand against the Spanish government, or our own: nothing of which any judicature could take cognizance. A right to damages begins when an injury is inflicted. 3 *Black. Com.* 116. But that is a suable right of municipal cognizance. So a captor has a defensible and imperfect right, after capture, but only because the prime Courts are open to him. Whereas Vasse could have sued or complained no where. The wrong he sustained was by a tort. The only redress was sovereign and international. The wrong was belligerent. The claim was by this nation against that. There was no arbiter, and war was the only remedy. The bounty which resulted after twenty years' negotiation, was a sovereign boon, altogether contingent, gratuitous, unliquidated, and fortuitous. Spain had declined in power.

This country had improved. Her colonies, our neighbours, revolted, after our example. Florida, her province, happened to be convenient for our requital, and the very seizure of that province, which preceded its transfer, was not only accidental, but unauthorized. Grotius is quoted for the position, that an individual right exists to make reprisal for wrong suffered. But both Grotius and Rutherforth speak of national, not individual redress. Grotius does indeed refer to Homer for the authority of Nestor, who is reported by that authority to have reprised on the cattle of the Eleans, for their stealing his horses. But this is not modern law, if it be even Grecian, in the times of the Iliad. Individual reprisals are unknown to the modern law of nations, especially to the law of this country, which, by written constitution, requires a law enacted in form to make war lawful. Vasse, had no right to claim from Spain, or to act at all. He could do nothing but submit. Mr. Pinkney's argument, as referred to in the case of the Betsey, Furlong, does not contradict this position; and if it does, it was overruled by the majority of the commissioners, to whom it was addressed. Brown *vs.* The Phœnix Ins. Co. 4 *Binn.* 445, and Rhinelander *vs.* The Pennsylvania Ins. Co. 4 *Cra.* 45, do not affect the question of an assignment, by construction of the Act of Bankruptcy—and that is the only question. The sovereign grant was appropriated by treaty between the two nations. It was distributable by the United States. Similar claims have been settled with the Republic of Colombia, and are pending against France, Naples, and Denmark. The opposite argument has already transferred them in all cases of bankruptcy, by an unsuspected operation of law, constructively drawn from an expired Act of Congress; which argument, in like manner, has disposed of all the pensions or gratuities yet to be granted by our government to the officers of the revolution. They have all changed hands, unconsciously to the owners, who are petitioning, not for themselves, but the assignees of their creditors, in all instances of bankruptcy or insolvency. Can such an operation of law be possible or tolerable? Was such the intention of the framers of the Act of Congress, to establish an uniform system of bankruptcy throughout the United States? If so, and by dint of successful hostilities, a century hence, the claims on England, which have been relinquished by treaty, should be revived and acknowledged, their indemnity, if paid, will belong to assignees, not to sufferers. That the parties in this instance never thought of such result, has been shown. If Congress, nevertheless, so enacted it, such enactment, it has also been shown, transcends the English bankrupt statutes, and contravenes all the established and familiar principles of the common law. It may be added, that

the French, it is believed also the Dutch, and all other bankrupt systems, are the same. By the French, the things assigned, are goods, money, furniture, effects, and *choses in action*. *Code civ. Commerce, Liv.* 3. *Tit. prem. De la Faillite*, sec. 2. No where do possibilities, contingencies, mere rights of action for *torts*, or demands for unliquidated damages, pass from bankrupts or insolvents to their assignees. The American adjudications are uniform and strong in their current to that conclusion. 2 *Dal.* 213; Shoemaker *vs.* Keeley. 4 *Serg. & Rawl.* 28; Sommer *vs.* Wilt. 9 *Serg. & Rawl.* 248-9; North *vs.* Turner. 13 *Serg. & Rawl.* 54; O'Donnel *vs.* Seybert. 1 *Wash. C. C. Rep.* 13; Dusar *vs.* Murgatroyd. 3 *Day*, 272; Bird *vs.* Clark. 2 *Wash. C. C. Rep.* 406; Krumbhaar *vs.* Burt. The last case is in point; is a stronger case than the present; and has been acknowledged by the community as the settled law in Pennsylvania, for the last twenty years. To inquire whether the possibility of Vasse's recovery, would, in case of his death, have passed by will, or in course of administration, is but petitioning the principle in contest. Even conceding the affirmative, does not affect the question which depends on the construction of the Act of Congress; but it would be wrong to concede it against the authority of Preston, the case in second *Swanston*, and the case of Krumbhaar *vs.* Burt.

Mr. Justice STORY delivered the opinion of the Court.—

This was an action of *assumpsit*, brought by Ambrose Vasse, in the Circuit Court, for the district of Pennsylvania, to recover from the plaintiffs in error, (who were defendants in the Court below,) a certain sum of money, received by them under the following circumstances:—

Previous to the year 1802, Vasse was an underwriter on various vessels and cargoes, the property of citizens of the United States, which were captured, and carried into the ports of Spain and her dependencies, and abandonments were made thereof to Vasse, by the owners, and he paid the losses arising therefrom, prior to the year 1802. Vasse became embarrassed in his affairs, and his creditors proceeded against him, as a bankrupt; under the Act of Congress of 4th April 1800, ch. 19. An assignment was made accordingly to Jacob Shoemaker, (who is deceased,) and the defendants, Comegys and Pettit, who proceeded to take upon themselves the duties of assignees, and have ever since continued to perform the same. Vasse was discharged, under the commission; and his certificate of discharge bears date the 28th of May 1802. In the year 1824, the sum of 8846 dollars 14 cents, was received by the defendants from the Treasury of the United States; being the sum awarded by the commissioners sitting at Washington,

under the treaty with Spain, which ceded Florida to the United States, dated 22d of February 1819, on account of the captures and losses aforesaid. On the 9th of December 1823, Vasse filed a bill in equity in the Circuit Court of the district of Columbia; which is in the case; upon which it seems no final proceedings were had on the merits. Under the commission of bankruptcy, Vasse made a return of his effects to the commissioners; which is in the case.

Upon these facts, a general verdict was found for the plaintiff, Vasse, for the sum of 8846 dollars 14 cents, subject to the opinion of the Court, with liberty for either party to turn the same into a special verdict; and the Circuit Court gave judgment upon the facts in favour of the original defendant. The present is a writ of error, brought for the purpose of ascertaining the correctness of that judgment.

Three questions have been argued at the bar.—1. Whether the award of the commissioners, under the treaty with Spain, directing the money to be paid to the defendants, as assignees of Vasse, (which is assumed to be the true state of the fact,) is conclusive, upon the rights of Vasse; so as to prevent his recovery in the present action. 2. If not, whether the abandonment of the vessels and cargoes to him, as underwriter, by the owners, and his payment of the losses, entitled him to the compensation awarded, independent of his bankruptcy. 3. If so, then, whether his right and title to the compensation, passed by the assignment of the commissioners of bankruptcy, to the defendants, as his assignees, by the true intent and terms of the Bankrupt Act of 1800, ch. 19.

1. As to the first point.—

1. The treaty with Spain, of the 22d of February 1819, was ratified on the 13th of February 1821, by the government of the United States. In the 9th article it provides, that the high contracting parties "reciprocally renounce all claims for damages or injuries, which they themselves, as well as their respective citizens and subjects may have suffered, until the time of signing this treaty;" and then proceeds to enumerate, in separate clauses, the injuries to which the renunciation extends.

The 11th article provides, that the United States, exonerating Spain from all demands in future, on account of the claims of their citizens, to which the renunciations herein contained, extend, and considering them entirely cancelled; undertake to make satisfaction for the same, to an amount not exceeding five millions of dollars. To ascertain the full amount and validity of these claims, a commission, to consist of three commissioners, &c., shall be appointed, &c., and within the space of three years from the time of their first meeting, shall "*receive, examine*, and *decide upon the amount and validity of all claims*

included within the descriptions above mentioned." The remaining part of the article is not material to be mentioned.

It has been justly remarked, in the opinion of the learned Judge who decided this cause in the Circuit Court; that it does not appear, from the statement of facts, who were the persons who presented or litigated the claim before the Board of Commissioners; nor whether Vasse himself was before the board; nor who were the parties to whom, or for whose benefit, the award was made. We do not think that the fact is material, upon the view which we take of the authority and duties of the commissioners. The object of the treaty was to invest the commissioners with full power and authority to receive, examine, and decide upon the *amount* and *validity* of the asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final. If they pronounce the claim valid or invalid, if they ascertain the amount, their award in the premises is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal; an amount once fixed, is a final ascertainment of the damages or injury. This is the obvious purport of the language of the treaty. But it does not necessarily or naturally follow, that this authority, so delegated, includes the authority to adjust all conflicting rights of different citizens to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself, and it is wholly immaterial for this purpose, upon whom it may, in the intermediate time, have devolved; or who was the original legal, as contradistinguished from the equitable owner, provided he was an American citizen. If the claim was to be allowed as against Spain, the present ownership of it, whether in assignees or personal representatives, or *bona fide* purchasers, was not necessary to be ascertained, in order to exercise their functions in the fullest manner. Nor could they be presumed to possess the means of exercising such a broader jurisdiction, with due justice and effect. They had no authority to compel parties, asserting conflicting interests, to appear and litigate before them, nor to summon witnesses to establish or repel such interests; and under such circumstances, it cannot be presumed, that it was the intention of either government, to clothe them with an authority so summary and conclusive, with means so little adapted to the attainment of the ends of a substantial justice. The validity and amount of the claim being once ascertained by their award, the fund might well be permitted to pass into the hands of any claimant; and his own rights, as well as those of all others, who asserted a title to the fund, be left to the ordinary course

of judicial proceedings in the established Courts, where redress could be administered according to the nature and extent of the rights or equities of all the parties. We are therefore of opinion, that the award of the commissioners, in whatever form made, presents no bar to the action, if the plaintiff is entitled to the money awarded by the commissioners. The case of Campbell *vs.* Mullett, 2 *Swanston's Rep.* 551, is distinguishable. The claim in that case had been laid before the commissioners, and rejected by them, on the ground that the party was alien enemy; and if so, he certainly did not come into the purview of the treaty. It was not pretended, that the party had any title to the indemnity, unless it could be deemed partnership property, and, as a partner, he was entitled to share in it. The Court considered that it was not partnership property in which he had a title;—that his claim to any portion of it had been rejected, upon the ground, that such claim was not within the treaty; and the indemnity had been granted to the other partners, for their shares only, of the joint property, and they took no more than their own shares. The Court then proceeded, upon the ground, that there neither was an original, nor a derivative title, to the indemnity, in the party now seeking to set it up. If an assignment had been shown from them to him, of their own interest in the claim or award, before or after it was made, the case might have admitted of a very different consideration. Whatever, therefore, might be the authority of that case upon general principles; upon which it is unnecessary to pass any opinion; it is inapplicable to the present.

2. The next question is not noticed in the opinion of the Circuit Court, turns upon the nature and effect of an abandonment, for a total loss to the underwriters. Much argument has been employed, and many authorities introduced, to prove what rights and interests, possibilities and expectancies, may or may not pass by assignment; we do not think it necessary to review these authorities, or the principles upon which they depend, upon the present occasion. In general, it it may be affirmed, that mere personal *torts*, which die with the party, and do not survive to his personal representative, are not capable of passing by assignment; and that vested rights *ad rem* and *in re*, possibilities coupled with an interest, and claims growing out of, and adhering to property, may pass by assignment. But the material consideration here, is, whether upon the principles of the law merchant, the right, title, interest or possibility, (call it which you may,) to the indemnity awarded in this case, did not pass by the abandonment to Vasse.

We do not think, that upon an examination of the doctrines of insurance, there is any difficulty in this part of the case. It

does not appear on the record, whether there was, in this instance, any formal instrument of abandonment or not, nor is it material, for the law gives to the act of abandonment, when accepted, all the effects, which the most accurately drawn assignment would accomplish. By the act of abandonment, the insured renounces and yields up to the underwriter all his right, title, and claims, to what may be saved; and leaves it to him to make the most of it, for his own benefit. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be rescued from destruction. This is the language of the elementary writers, and is fully borne out by Mr. Marshall and Mr. Park, in their treatises on insurance. *Mar. on Ins. B.* 1 *a* 14. *Park on Ins. ch.* 9, *p.* 228. 279. "Where, (says Mr. Marshall) as in case of capture, the thing insured, and every part of it, is completely gone out of the power of the insured, it is just and proper, that he should recover at once, as for a total loss, and leave the *spes recuperandi* to the insurer; who will have the benefit of a recapture, or of any other accident, by which the thing may be recovered." Mr. Park uses equally strong language—he says "the insured has a right to call upon the underwriter for a total loss, and of course to abandon, as soon as he hears of such a calamity having happened; his claim to an indemnity not being at all suspended, by the chance of a future recovery of part of the property lost; because by the abandonment, that chance devolves upon the underwriters." It is very clear, that neither of these learned writers meant to confine these remarks to cases, where the specific property itself, or its proceeds, were restored; for the whole current of their reasoning, in the context, goes to show, that whatever may be afterwards recovered or received, whether in the course of judicial proceedings or otherwise, as a compensation for the loss, belongs to the underwriters; and for this purpose, they refer to the case of Randall *vs.* Cochran, (1 *Vez.* 98.) before Lord Hardwicke, where this very point was adjudged. In that case, the king had granted letters of reprisal against the Spaniards, for the benefit of his subjects, in consideration of the losses which they had sustained by unjust captures, and he appointed commissioners to distribute the produce of these reprisals among the sufferers; and the commissioners would not suffer the underwriters, but only the owners, to make claim for the losses; although the owners were already satisfied for their loss, by the underwriters. Lord Hardwicke decreed, that the owner should account for the same to the underwriter; and said, "the person who originally sustained the loss, was the owner, but after satisfaction made to him, the insurer. No doubt, but from that time, as to the goods themselves, if restored in specie, or compensation made for them, the insured stood as a trustee for

the insurer, in proportion to what he paid, although the commissioners did right to avoid being entangled in accounts, and in adjusting the proportion between them. Their commission was limited in time; they saw who was owner; nor was it material to whom he assigned his interest, as it was in effect after satisfaction made." This case reflects no inconsiderable light upon the point already discussed, as to the conclusiveness of the award of the commissioners. But it is decisive, that the assignment by abandonment, is competent not only to pass the property itself, or its proceeds, if restored, after an unjust capture, but also any compensation awarded by way of indemnity therefor. The case before Lord Hardwicke, was the stronger, because the indemnity was awarded to the party by his own sovereign, and not by the sovereign of the captors. Mr. Marshall and Mr. Park manifestly contemplate the case as establishing the principle, that any indemnity, however arising, is a trust for the underwriters, after they have paid the loss. *Park on Ins. ch.* 8, *p.* 229. *Mar. on Ins. B.* 1, *ch.* 14, § 4.

The case of Gracie *vs.* The New-York Insurance Company, (8 *Johns. R.* 237,) recognises the same principle, in its full extent. That was a case of abandonment after a capture, and where there had been a final condemnation, not only by the Courts in France, but an express confirmation of the condemnation by the sovereign himself. One question was, whether the jury were at liberty to deduct from the total loss, the value of the *spes recuperandi.* The Court held that they were not. Mr. Chief Justice Kent, in delivering the opinion of the Court, said; "if France should, at any future period, agree to, and actually make compensation for the capture and condemnation in question, the government of the United States, to whom the compensation would, in the first instance, be payable, would become trustee for the party having the equitable title to the reimbursement; and this would clearly be the defendants [the underwriters,] if they should pay the amount, &c." The case of Watson *vs.* The Insurance Company of North America, (1 *Binn. R.* 47,) proceeds upon the same principles. It admits that the *spes recuperandi* passes by an abandonment to the underwriter; and the question there was, whether its value, when not abandoned, was to be deducted from the total loss. We consider it, then, clear, upon authority, that the right to the compensation in this case, was in its nature assignable, and passed by abandonment to Vasse; and upon principle, we should arrive at the same conclusion. The right to indemnity for an unjust capture, whether against the captors or the sovereign; whether remediable in his own Courts, or by his own extraordinary interposition and grants upon private petition, or upon public negotiation, is a right attached to the

ownership of the property itself, and passes by cession to the use of the ultimate sufferer. If so assignable to Vasse, it was equally, in its own nature, capable of assignment to others; and the only remaining inquiry would be, whether it had so passed by assignment from him.

The case of Campbell *vs.* Mullet, (2 *Swanston*, 551,) already adverted to, has been pressed upon the attention of the Court as indicating, certainly not as deciding, a doctrine somewhat different. In that case, the compensation had been awarded by the commissioners under the British treaty of 1794, to American citizens, for unjust captures made by British cruisers; and there had been condemnations by the highest appellate Courts of prize. One argument was, that the compensation so granted, was not to be deemed a mere donation to the parties who received it for their own use, but an indemnity. The Master of the Rolls, in answer to this, said: "It is said that the sums awarded by the commissioners are not matter of bounty or donation. Can they be a matter of right? What is right? That which may be enforced in a Court of Justice. Had the parties, whose property was condemned by irrevocable sentence, any right? What they obtain after that condemnation, is not founded in right, but in policy between the nations, providing compensation to individuals, who have lost property by sentences, which are thought unjust. The grounds of relief before the commissioners, are, the want of any redress in any municipal Courts. Whatever the individual obtains, is not on the ground of right, or private property, but of hardship and injustice. Though this, therefore, is not a case of pure donation, as of a gift without any thing in the nature of a consideration, yet for the purpose of being contrasted with property or right, it is a donation, not a restoration of a former right, but from a new fund, belonging to an independent authority, a grant to the sufferer for what he lost." Such is the language of the learned Judge, and we cannot say that the reasoning is at all satisfactory. It is not universally, though it may ordinarily be one test of right, that it may be enforced in a Court of Justice. Claims and debts due from a sovereign, are not ordinarily capable of being so enforced. Neither the King of Great Britain, nor the government of the United States, is suable in the ordinary Courts of Justice, for debts due by either. Yet, who will doubt, that such debts are rights? It does not follow, because an unjust sentence is irreversible, that the party has lost all right to justice, or all claim, upon principles of public law, to remuneration. With reference to mere municipal law, he may be without remedy; but with reference to principles of international law, he has a right, both to the justice of his own and the foreign sovereign. The the-

ory, too, that an indemnification for unjust captures is to be deemed, if not a mere deviation, as in the nature of a donation, as contrasted with right, is not admissible. It is reasoning against the clear text of the treaty itself. What says the treaty of 1794, § 7? That where American citizens have sustained losses or damages, "by reason of irregular or illegal captures, or condemnations of their vessels, or other property, under colour of authority or commissions from His Majesty, and adequate compensation cannot be obtained by the ordinary course of judicial tribunals, full and complete compensation for the same will be made by the British government to the said complainants." The very ground of the treaty is, that the municipal remedy is inadequate; and that the party has a right to compensation for illegal captures, by an appeal to the justice of the government. It was never understood, that the case was one to which the doctrine of donation applied. The right to compensation, in the eye of the treaty, was just as perfect, though the remedy was merely by petition, as the right to compensation for an illegal conversion of property, in a municipal Court of Justice. The case of Randall *vs.* Cochran, (1 *Vez.* 98,) stands upon the true ground. It considers the right of indemnity as travelling with the right of property. In that case it might have been said, in answer to the claims of the underwriters, that they had no title, because it was a case of donation by the crown, out of funds provided by reprisals. So, perhaps, the commissioners thought, but Lord Hardwicke decided otherwise. There cannot be a doubt, that if the party injured had died before or after the treaty was made, and compensation had been subsequently decreed, it would have been assets, and distributable as such, in the hands of his executors and administrators. The remarks which have been made upon this case, are equally applicable to the provisions for indemnity, under the treaty with Spain. It recognised an existing right to compensation, in the aggrieved parties, and did not, in the most remote degree, turn upon the notion of a donation or gratuity. It was demanded by our government as matter of right, and as such it was granted by Spain.

We may now come to the point, which indeed is the only one of any intrinsic difficulty in the cause—whether the right, so vested in Vasse, to compensation, passed, under the bankruptcy assignment, to his assignees? That this is a question free of doubt, will not be affirmed by any person who has thoroughly examined it, or read with care the elaborate opinion of the Court below. The true solution of it must be found in a just exposition of the object, intent, and language of the Statute of Bankruptcy of 1800, ch. 19. The Act begins by an enumeration of the persons who are liable to be declared bank-

rupts, and among them are "underwriters or marine insurers." This plainly shows the sense of the legislature, that such persons might, by the ordinary course of their business, be reduced to insolvency, and be justly placed within the beneficial operation of such a law. It tends also to the presumption, that it might have been the intent of the legislature, that the rights devolved upon them, from the nature of the losses for which they were liable, so far as under any circumstances they might or could be valuable rights, should be available as a fund for the benefit of their creditors, in case of their bankruptcy. As the legislature meant to exonerate the underwriter from all future liability for his debts; it would seem natural that the claims abandoned to him, which might constitute the whole of his effective estate, should be vested in his assignees, for the benefit of his creditors. If he possessed claims by abandonment, to the amount of 100,000 dollars, which might, by future events, be rendered more or less productive, and which might be, (as they have often been,) saleable and transferrible in the market; such funds, present or expectant, might well be deemed within the legislative policy, and fit to pass to the creditors by assignment. It might otherwise happen, that large recoveries might ultimately vest in the bankrupt, for his own exclusive benefit, upon rights pre-existent, and vested at the time of his bankruptcy. If such a course of legislation would not be unnatural, let us next see what is the precise language of the statute itself. The fifth section declares, that it shall be the duty of the commissioners, after the party has been declared a bankrupt, "to take into their possession all the estate, *real* and *personal*, of every nature and description, to which the bankrupt may be entitled, either in law or equity, in any manner whatsoever, &c.; and also to take into their possession, and secure, all deeds and books of accounts, papers and writings, belonging to the bankrupt; and shall cause the same to be safely kept, until assignees shall be chosen, or appointed."

These words are certainly very general and comprehensive. "All the estate, real and personal, of every nature and description, in law or equity," are broad enough to cover every description of vested right and interest, attached to and growing out of property. Under such words, the whole property of a testator would pass to his devisee. Whatever the administrator would take, in case of intestacy, would seem capable of passing by such words. It will not admit of question, that the rights devolved upon Vasse, by the abandonment, could, in case of his death, have passed to his personal representative; and when the money was received, be distributable, as assets. Why then should it not be assets in the hands of the assignees?

Considering it in the light in which Lord Hardwicke viewed it, as an equitable trust in the money; it is still an interest, or at all events, a possibility coupled with an interest. Besides, "all deeds, books, accounts, papers, and writings of the bankrupt," are to be taken into possession. Now the abandonment, and other documents connected with it, fall precisely within these terms; and as we shall immediately see, whatever is taken possession of by the commissioners, is to be passed to the assignees. The sixth section provides "that the commissioners shall assign, transfer, or deliver over, all and singular the said bankrupt's *estate* and *effects* aforesaid, with "*all muniments and evidences* thereof," to the assignees so chosen. And for the most part, the words "estate and effects" are used throughout the Act, as descriptive of the property passing under the assignment. The 11th, 12th, and 13th sections of the Act, respect more particularly the transfer of the real estate, of the mortgages, and of the debts of the bankrupt. It is only necessary to say, that they contain no language abridging the proper inferences deducible from the language of the fifth section.

The 18th section contains provisions respecting the surrender and examination of the bankrupt, and are very material. It provides, that upon such examination, he shall "fully and truly disclose and discover all his or her effects and estate, real and personal, and how and in what manner, and to whom and upon what consideration, and at what time or times, he or she hath disposed of, assigned, or transferred, any of his or her goods, wares, or merchandise, moneys, or other effects and estate; and of all books, papers, and writings, relating thereunto, of which he or she was possessed; or in which he or she was in any ways interested or entitled, or which any person or persons shall then have, or shall have had in trust for him or her, or for his or her use, at any time *before* or after the issuing of the said commission; or whereby such bankrupt, or his or her family, *then hath or may have, or expect any profit, possibility of profit, benefit, or advantage whatsoever, &c.*" It then goes on further to provide, that the bankrupt shall, upon such examination, execute in due form of law, such conveyance, assurance, and assignment, of his or her estate, whatsoever and wheresoever, as shall be deemed and directed by the commissioners to *vest the same* in the "assignees;" and also requires the bankrupt to deliver up "all books, papers, and writings relating thereunto," which are in his possession, custody, or power, at the time of the examination: upon his default in these particulars, he is deemed a fraudulent bankrupt, and deprived of a right to a certificate of discharge, and subjected to severe punishments. If there were any doubt upon the meaning of the language of

the fifth section, we think it is cleared up and illustrated by that of the present. Here, the words "*profit, possibility* of *profit, benefit*, or *advantage* whatsoever," are used, and show that mere interests *in presenti*, and capable of present enjoyment, were not alone within the scope of the legislative enactments, but also all such interests, or possibilities of interest, as might thereafter beneficially arise from present vested rights. It extends to such effects and estate, "whereby the bankrupt then hath, or may have or expect any profit." It has been supposed, that this clause looks solely to property, which was not capable of assignment, at the time of the bankruptcy, because not then vested; inasmuch as the bankrupt himself, and not the commissioners, is required to make an assignment of it. If this were so, it would not affect the present case, because we are of opinion, that the claim under consideration, was completely vested in right and interest in Vasse, at the time of his bankruptcy. We think, however, that this clause does not justify so narrow an interpretation. The disclosure is required of estate and effects, in which the bankrupt was interested, as well *before* as after the issuing of the commission; and the bankrupt is required to execute conveyances, not of such estate and effects merely, as accrued after the commission, but of his estate, "whatsoever and wheresoever." The object of the provision was to make such conveyances auxiliary to, and confirmatory of the assignments made by the commissioners; and we believe, that in practice, it was so generally understood and acted on, while the statute was in force. The 50th section of the Act, has been supposed to demonstrate the correctness of the construction of the statute contended for by the counsel for the original plaintiff. It declares "that if any estate, real or personal, shall *descend, revert to*, or become *vested* in, any person, after he or she shall be declared a bankrupt, and before he or she shall obtain a certificate, &c. all such estate shall, by virtue of this Act, be vested in the said commissioners, and shall be by them assigned and conveyed to the assignees, &c. This section plainly refers to estate to which the bankrupt had no right or title whatever, in law or equity, vested in interest or in possession, at the time of his bankruptcy. The cases put, are of property descending, reverting to, or becoming vested in the bankrupt. In respect to a descent cast, after the bankruptcy, it is manifest, that nothing could pass by any antecedent assignment of the commissioners.

The heir, during the lifetime of his ancestor, has no right, claim, title, or interest, in the ancestral estate. It is a mere naked expectancy, liable to be defeated at the will of the ancestor at all times; and in no just sense, a possibility of interest, a right in the thing itself. The other words, "reverting

to, or become vested" in the bankrupt, require a like interpretation. They allude to cases where the party had nothing vested in him, as a subsisting interest, either absolute or contingent, *in esse* or *in futuro*, until after the bankruptcy: and when any such interest falls in before the certificate of discharge, the commissioners, and not the bankrupt, are to assign it; a circumstance which demonstrates that no stress ought to be laid upon that part of the 18th section, already alluded to, respecting a conveyance by the bankrupt himself; except as a confirmation, and not as a principal assurance. It seems to us then, that the 50th section aids, rather than shakes the interpretation of the statute, which has been already announced. It applies to no possibility of profit, benefit, or advantage, vested at the time of the bankruptcy, (as the present case is;) but to interests accruing to the party for the first time, *de jure* as well as *de facto*, after the bankruptcy. This view of the matter renders it unnecessary to consider, whether there is any substantial difference between the English statutes of bankruptcy and our own, on this subject; and of course, in the authorities applicable to it. Our opinion proceeds upon the purview and objects, and on the terms of our own statute; and we are accordingly of opinion, that the judgment of the Circuit Court ought to be reversed, and a judgment entered in favour of the original defendants. It is to be understood, that upon the last point, this is the opinion of the majority of the Court.

The cause must be remanded, with directions to enter a judgment accordingly, for the original defendants.

This cause came on, &c. on consideration whereof, It is ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be and the same is hereby reversed and annulled—and that a judgment be entered in the suit, in favour of the plaintiffs in error, Cornelius Comegys and Andrew Pettit; and the cause remanded to said Circuit Court, with directions to enter judgment for the plaintiffs in error in this Court, Cornelius Comegys and Andrew Pettit, accordingly.

CHARLES W. KARTHAUS, PLAINTIFF IN ERROR, *vs.* FRANCISCO YLLAS Y FERRER AND OTHERS, DEFENDANTS IN ERROR.

There is a class of cases, upon awards, to be found in the books, in which arbitrators have been held to more than ordinary strictness, in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of this submission being conditional, *ita quod*. But the rule is to be understood, with this qualification; that in order to impeach an award made in pursuance of a conditional submission, on the ground of part only of the matters in controversy having been decided, the party must *distinctly* show, that there were other points in difference, of which express notice was given to the arbitrators; and that they neglected to determine them. {227}

One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both, to arbitration; but he might bind himself, so as to submit his own interests to such decision. {228}

It is a settled rule in the construction of awards, that no intendment shall be indulged to overturn an award, but every intendment shall be allowed to uphold it. {228}

If a submission be of all actions, real and personal, and the award be only of actions personal, the award is good; for, it shall be presumed, no actions real were depending between the parties. {228}

When, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference; an award was made, directing the payment of money, in an action on the bond, to abide by the award; the breach assigned, was, that the partner who agreed to the reference did not pay, &c.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. {231}

ON the 16th of January 1823, the plaintiff in error gave an arbitration bond, in the usual form, with sureties, to the defendants in error, in which it was set forth, that, "whereas certain disputes, differences, and controversies, have arisen, and are still depending, between the above bounden Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co. and himself, and the above named Francisco Yllas y Ferrer, and Josef Antonio Yllas, for the ending and determining the disputes, differences, and controversies, aforesaid, and all actions, suits, claims, and demands whatsoever, concerning the same, the said parties have agreed to refer the same to the award, judgment, and determination, of Lewis Brantz and Henry Child, both of Baltimore, merchants; arbitrators indifferently chosen, and named by and on behalf of the said parties, to award, order, arbitrate, judge, and determine, concerning the same. And if the said arbitrators cannot determine the same, that then the same shall be fully ended and determined by a third person, to be by them chosen as an umpire, in such

manner as hereinafter is, in that behalf, mentioned and expressed.

"Now, the condition of this obligation is such, that if the above bound Charles W. Karthaus, his heirs, executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil, and keep the award, arbitrament, order, determination, final end, and judgment, which shall be by them, the aforesaid arbitrators, made, of and concerning the premises, and of all disputes, differences, actions, suits, claims, and demands whatsoever, touching and concerning the same, so as such award, arbitrament, determination, final end, and judgment of the said arbitrators, of and in the premises, be by them made and given up in writing under both their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days from the day of the date hereof.

"And if they the said arbitrators, of and in the said premises, cannot agree, end, and determine the same, in fifty days from the day of the date hereof, that then if the said Charles W. Karthaus, his heirs, executors, administrators, and every of them, shall and do, for and on his and their parts, in and by all things, stand to, obey, abide, perform, fulfil, and keep the award, arbitrament, and umpirage, of the above named arbitrators, and such third person and umpire, as they the said arbitrators shall indifferently name, elect, and choose, for the ending and determining the same premises, or a majority of them, so as such award, umpirage, and judgment of the said arbitrators and umpire, or a majority of them, of and concerning the same, be by them so made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in sixty days from the day of the date hereof, This obligation to be void and of no effect, otherwise the same shall remain in full force and virtue."

Upon this reference, the following award was made, under the hands and seals of the arbitrators and the umpire.—

We, the undersigned, Henry Child, and Lewis Brantz, as arbitrators, and Michael M'Blair, as umpire, acting in virtue of the annexed bond or instrument of writing, do hereby award, and adjudge, that the late firm of Charles W. Karthaus & Co. pay, or cause to be paid, unto Francisco Yllas y Ferrer and Josef Antonio Yllas, or their representatives, the sum of fourteen hundred and seventy-five dollars, for a balance of the general account current between the parties; and also the sum of thirteen hundred and ninety-eight dollars, for a balance arising out of the moneys recovered for the brig Arogante Barcelonese and cargo; in which award, a parcel of cutlasses, or their

proceeds, are considered as becoming the property of said Yllas y Ferrer.

Given under our hands and seals, in Baltimore, this 8th of March 1828.

To an action on the bond, against the plaintiff in error, he pleaded the condition, and that no award had been made. The defendants in error replied, and answered, and set it out as stated; and there was a demurrer to the replication, which the Court overruled, and a judgment was entered for the plaintiff below. In this judgment error was alleged; and before this Court, the plaintiff in error sought to maintain—

1. That the award is not agreeable to the submission.
2. It is not certain, final, and mutual.
3. It directs an act to be done by strangers.
4. It is defective in other respects.

The case was argued by Mr. Hoffman, and Mr. Mayer, for the plaintiff in error; and by Mr. Wirt, Attorney General, for the defendants.

For the plaintiff in error.—

The object of the submission was, to have all the matters in controversy adjusted by the arbitrators, and the words "certain disputes," so meant and intended, 2 *Caines' Rep.* 320. 15 *John. Rep.* 197. *Com. Dig. Arbitration*, 4 *D.*

1. This was a submission between all the parties, the plaintiff in error, and the firm of which he was a member, there being partnership and individual disputes; and the award does not apply to all, but only to the plaintiff in error. It should profess to decide every thing in the premises.

The submission being conditional, *ita quod*, the referees were bound to pursue, strictly, the submission in all its terms, and to award on all matters submitted to them. 2 *Gallison's Rep.* 778. *Cokes' Rep.* Bascoe's case, 193. 1. *Salk.* 70. *Kyd on Awards*, 176.

2. An award must be so certain, that it may be pleaded in bar, to an action against the parties to it; which is not the fact in this case. 1. It does not comprehend all the parties, nor decide upon all the subjects in dispute; it is uncertain and contradictory, and there are no averments in the replication which will supply these deficiencies—there should have been an averment as to the members of the firm—as to the accounts, and the transactions out of which the accounts grew. By no form of pleading, could the plaintiff in error show he had, in this case, satisfied the claims of the defendant in error. The award should have designated the claims on the plaintiff, individually, and on the firm; nor does it appear by it, that Charles W. Karthaus, and C. W. Karthaus & Co., were the same persons.

(Karthaus vs. Ferrer et al.)

Cited, 1 *Bacon's Abr. Arbit. and Award, pl. E.* 1. 216. 1 *Com. Dig.* 666. *Tit. Awd. pl. E.* 4. 7 *East*, 81. 5 *Wheat.* 394.

In an action on an award, the plaintiff is not bound to set out the particulars; but if he proceed on the bond, he must set out the breaches with particularity. The defendant may do it, but it is the duty of the plaintiff; *Kyd on Awards*, 195. That part of the award, by which "a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer," is altogether uncertain. It does not state what cutlasses, or what the amount of the proceeds, considered as the property of Yllas y Ferrer, were included, or referred to.

Mr. Wirt, for the defendants in error.—

The Court are always disposed to maintain awards, *Caldwell on Arbitrations*, 123.

The pleadings do not exhibit any thing from which error can be imputed. The defendant should have rejoined, and shown that there were other parties, and other matters, than those stated in the award; having failed to do this, there is nothing before the Court but the submission and the award; and there is nothing to show, that there were other persons interested, and other matter to be acted on, but those stated in the award. This form of pleading, is only waived when the submission sets out every matter at large. Cited, *Kyd on Awards*, 171. 7 *East*, 81.

The firm is not a party to the submission; and the partner who submitted to the arbitration, will alone be bound by it, and to pay the amount awarded, *Kyd*, 40. As to the set-off, in such a case of individual and partnership accounts, cited 5 *T. Rep.* 493. 6 *T. Rep.* 582-3.

Certainty, to a common interest only, is required in awards. This award is sufficiently certain. *Kyd*, 132. 1 *Caines' Rep.* 314, 315. 14 *John.* 108, 109.

If the award be certain in part, it may be executed for so much as is certain; although another part is uncertain; unless the part which is uncertain is the consideration for that which the uncertain part was given. 5 *Wheat.* 409. The award here is entirely for the defendants in error, and if any part of it is uncertain, which is denied, the plaintiff in error cannot complain. 11 *Wheat.* 448. The cutlasses and the proceeds are sufficiently designated, and if they were not, it was for the plaintiff below, only, to complain.

Mr. Justice TRIMBLE delivered the opinion of the Court:—

This was an action of debt, brought by Francisco Yllas, and Josef Antonio Yllas, against Charles W. Karthaus, on an arbitration bond, in the Circuit Court of the district of Maryland.

The defendant, after oyer of the condition of the bond, pleaded, no award made. &c. The plaintiff replied, setting

forth the award in *hæc verba*, and assigning a breach; the defendants demurred generally, and the plaintiff joined in demurrer. The Circuit Court having given judgment, upon the demurrer, in favour of the plaintiffs; the defendant has brought the case up, by writ of error, for the consideration of this Court.

The first and principal ground relied on by the plaintiff in error, for the reversal of the judgment, is, that the award is not agreeable to the submission, in this; that two several distinct controversies, the first between the plaintiffs and the late house of Charles W. Karthaus & Co., and the second between the plaintiffs and Charles W. Karthaus, individually, were submitted to the referees, and that they left the latter undetermined. The condition of the bond, after reciting, that certain disputes, differences, and controversies have arisen, and are still depending between the above bound Charles W. Karthaus, acting for his late house of Charles W. Karthaus & Co., and for himself and the above named Francisco Yllas y Ferrer, and Josef Antonio Yllas, &c., "refers the same to the referees named, and their umpire, and binds the said Charles W. Karthaus, &c. to abide by and perform their award;" so as such award, &c. "of the arbitrators, of and in the premises, be by them made and given up in writing, under their hands and seals, ready to be delivered to each of the said parties in controversy, in fifty days."

The arbitrators, and their umpire, within the time limited by the submission, made and delivered their award in writing, under their hands and seals, in the following words, to wit: "We, the undersigned, Henry Child and Lewis Brantz, as arbitrators, and Michael M'Blair, as umpire, acting in virtue of the annexed bond, or instrument of writing, do hereby award and adjudge, that the late firm of C. W. Karthaus & Co. pay to Francisco Yllas y Ferrer, and Josef Antonio Yllas, or their representatives, the sum of fourteen hundred and seventy-five dollars, for the balance of the general account current between the parties, and also the sum of thirteen hundred and ninety-eight dollars, for a balance arising out of moneys received for the brig Arogante Barcelonese, and cargo; in which award, a parcel of cutlasses, or their proceeds, are considered as becoming the property of the said Yllas y Ferrer."

It is plainly seen, from the face of the award, that the arbitrators have not contradistinguished between Charles W. Karthaus, as a member of the late house of Charles W. Karthaus & Co., and Charles W. Karthaus, as an individual, unconnected with his late house. The argument is, that this omission of the referees vitiates the award. It is said that this, being a conditional submission, *ita quod*, the arbitrators were bound to pursue the submission strictly, and to award, of and

concerning every matter referred to them. In support of this argument, the counsel referred to Randall *vs.* Randall, 7 *East*, 80, and several other cases less apposite.

That there is a class of cases in the books, in which arbitrators have been held to a more than ordinary strictness in pursuing the terms of the submission, and in awarding upon the several distinct matters submitted, upon the ground of the submission being conditional, *ita quod*, is conceded. The case of Randall *vs.* Randall is a leading case of that class. Lord Ellenborough, C. J. in delivering the opinion of the Court, says: "The arbitrators had three things submitted to them; one was to determine all actions, &c. between the parties; another was to settle what was to be paid by the defendant for hops, poles, and potatoes, in certain lands; the third was to ascertain what rent was paid by the plaintiff, to the defendant, for certain other lands. The authority given to the arbitrators, was conditional, *ita quod*, they should arbitrate upon these matters, by a certain day. The arbitrators have stopped short, and have omitted to settle one of the subjects of difference stipulated for."

This case was adjudged, according to the rule laid down in the books; that if the submission be conditional, so as the arbitrator decide of and concerning the premises, he must adjudicate upon each distinct matter in dispute, which he has noticed. *Kyd*, 177.

But the rule is to be understood with this qualification; that in order to impeach an award, made in pursuance of a conditional submission, on the ground only of part of the matters in controversy having been decided, the party must *distinctly* show, that there were other points in difference, of which express notice was given to the arbitrator, and that he neglected to determine them. *Caldwell*, 105. *Kyd*, 177. *Cro. Car.* 216. Baspole's case, 8 *Co.* 98. Ingraham *vs.* Milnes, 8 *East's Rep.* 445.

That Lord Ellenborough understood and intended to apply the rule, as thus qualified, in Randall *vs.* Randall, is manifest. For Mr. Espinasse, in commenting upon Baspole's case, having observed, that it is said in that case, that though there be many matters in controversy, yet if only one be signified to the arbitrators, he may make an award for that, for he is to determine according to the *allegata et probata*—and it is in every day's practice, that an award may be good in part, and bad in part. Lord Ellenborough, in answer to that argument, replies—"That is, where it does not appear there is any notice to the arbitrator, on the face of the submission, that there is any other matter referred to him, than those which are mentioned to him at the time of the reference. But here it does expressly appear, that there was another matter referred, on which there is no arbitrament."

In this case, it is not pretended that any notice was given to the arbitrators of any other matter, unless that notice was given on the face of the submission.

The question then is, does it distinctly appear, from the face of the submission, that any other point of difference between parties, was submitted, and of which the submission itself gave the arbitrators notice, but which they have neglected to determine.

If, as the argument supposes, there was any point in difference, which concerned Charles W. Karthaus, individually, as contradistinguished from the points in difference which concerned him as Charles W. Karthaus, of the late firm of Charles W. Karthaus & Co., what was that point of difference?

No satisfactory answer has been given, and it is believed none can be given, to this inquiry. How then can it be maintained, that a distinct point in difference between the parties was referred, and by the reference itself notified to the referees, which they have neglected to determine? The case of Ingraham *vs.* Milnes is a strong authority to show, that although the submission be conditional, *ita quod;* there must be a distinct specification, as in Randall *vs.* Randall, to sustain the objection, that part has been omitted by the arbitrators. Here the submission is in very general, and, we think, in very vague and ambiguous terms. It speaks of disputes, differences, and controversies, between Charles W. Karthaus, acting for the late house of Charles W. Karthaus & Co., and for himself and the plaintiffs. But how, or in what he acted, for the one or the other, is not specified. The terms "late house," imply the former existence, but present non-existence, of the late house of Charles W. Karthaus & Co. He may be the only surviving partner, the firm having ceased, by the death of the other members. But if the firm was continuing, Charles W. Karthaus, while he must be admitted to be perfectly competent to submit to reference his own interests in the firm, could not, by his submission, bind his partners. He might bind himself to perform whatever the award directed the firm of which he was a member, to do; so that, either way, it was a submission of his own interest only. In order to overturn the award, it is not enough that he may have had different and distinct interests in his individual and in his partnership character. It is a settled rule, in the construction of awards, that no intendment shall be indulged, to overturn an award, but every reasonable intendment shall be allowed, to uphold it. Thus, if a submission be of all actions, real and personal, and the award be only of actions personal, the award is good—for it shall be presumed no actions real were depending between the parties. *Kyd*, 72, and Baspole's case, before cited.

So in this case, although the submission speaks, in general terms, of disputes, differences, and controversies, with Charles W. Karthaus, acting for his late house of C. W. Karthaus & Co. and for himself; it shall not be intended there were any controversies with C. W. Karthaus, individually, other than those decided by the arbitrators. If any such did exist, inasmuch as they are not specifically and distinctly set forth in the submission, so as to give notice to the arbitrators, it was the duty of the party to show, by averment and proof *aliunde*, they were brought before the referees.

There is no analogy between this case and Lyle *vs.* Rogers, 5 *Wheat.* 394, cited at the argument. In that case, it was decided, that where claims against a party, both in her own right, and in her character of administratrix, were submitted to arbitrators, it was a valid objection to the award, that it awarded a gross sum to be paid by her, without distinguishing between what was to be paid by her in her own right, and what in her representative character. The Chief Justice, in delivering the opinion of the Court, explains the reason and ground of the decision, by observing, "if this award was made against Mrs. Dennison, as administratrix, she would not only be deprived by its form, of the right to plead a full administration, (a defence which might have been made before the arbitrators, and on which their award does not show, certainly, that they have decided;) but also of the right to use it in the settlement of her accounts, as conclusive evidence, that the money was paid in her representative character. If this objection to the award is to be overruled, it must be on the supposition that it is made against her personally; yet the statement of facts shows the claim against her to be in her representative character." This reasoning cannot apply to the case before the Court. It is of no sort of consequence to C. W. Karthaus, whether he is directed to pay as Charles W. Karthaus, individually, or as Charles W. Karthaus, of his late house of C. W. Karthaus & Co. In each case he is bound, personally, to pay, having bound himself so to do by the submission; and the award, if in any case it would be evidence for him against the firm, would not be conclusive, as he had no power to bind his partners, if any existed, by his submission. It is objected that the award is not certain, final, and mutual. It was said, in argument, that as the first sum awarded, is expressed to be for a "balance of the general account current, between the parties; the general account current, must be understood to include all accounts between them; and hence, that the second sum awarded, for a balance arising out of moneys received for the brig Arogante Barcelonese, is included in the first, and the party thus twice charged; or at least, that it does not certainly appear otherwise."

We think there is no foundation for this argument. To indulge such a supposition, would impute either manifest injustice, or gross negligence, to the referees. Great stress was laid, in the argument, on the uncertainty of the closing clause of the award, in these words, "in which award, a parcel of cutlasses are considered as becoming the property of said Yllas y Ferrer." There is considerable doubt and uncertainty, as to the meaning of the arbitrators, in the use of these terms. And had this uncertainty appeared in any part of the award, intended for the benefit of the defendant, it would, perhaps, be fatal to the whole award. Had that been the case, it would be hard and unjust, to compel him to perform that part of the award which is onerous to him, when he could not have, on account of its uncertainty, that which would be beneficial to him. But, however doubtful the precise intent and meaning of this part of the award may be, it is certain, it was intended as a benefit in some way, to Yllas y Ferrer, over and above the two sums of money directed to be paid to the plaintiffs. The defendant can have no reason to complain that the plaintiffs, or either of them, may not, on account of this uncertainty, be able to obtain all the benefits intended by the award; nor can it furnish any reason for withholding from them, that to which they are certainly entitled.

It is deemed a sufficient answer, to the objection of want of mutuality in the award, to remark, that great stress was laid, in the early cases, upon the mutuality of an award; but at present, it is by no means considered necessary that each party should be directed to do, or not to do, any particular thing, *Cald.* 113. Two had submitted to an award; nothing was awarded as to one party, but that all actions should cease. The Court held it a good award, Harris *vs.* Knight. 1 *Levz*, 58.

In Palmer's case, 12 *Mod.* 234, one party was directed to pay money to the other, without any directions being given to the latter in any way; and, again, it was awarded that A should pay B 40 shillings for a trespass; *Freeman*, 204. The respective awards were considered unimpeachable. These cases fully establish the principle above laid down. An award is regarded as final, when it is an absolute conclusive adjudication of the matters in dispute; and there is no reason to doubt the conclusiveness of the adjudication in this case, as to the two sums of money directed to be paid; and that the award will operate as a bar to any future litigation, upon the accounts for which they are given. Again: It is objected that the award directs an act to be done by strangers. This objection grows out of the direction in the award, that "the late firm of C. W. Karthaus & Co. pay, &c." Whatever might be the force of this objection, if it were true in point of fact, we cannot so regard it. So far as

appears upon the record, the late firm or house of C. W. Karthaus & Co. and C. W. Karthaus are one and the same person; or more properly speaking, it does not appear that there is any other person, *in esse*, belonging to that firm, than C. W. Karthaus himself. If there be any other person, *in esse*, of the late house of C. W. Karthaus & Co. it cannot be truly affirmed that he, and the house of which he was a partner, are strangers to each other. But we cannot, consistently with the rules of law, presume or intend there is any other; indeed, in support of the award, it may reasonably be intended there is not, as the party objecting was cognizant of the fact, and might have shown it, if true, but has not. The direction that the late firm of C. W. Karthaus & Co. shall pay, unquestionably includes C. W. Karthaus; and no other person appearing to exist, it is equivalent to a direction that he shall pay. This reason is applicable to the last ground assumed by the counsel for the plaintiff in error, for a reversal of judgment; namely, that the replication is insufficient, because, in assigning a breach, it only alleges C. W. Karthaus had not paid. As no other was, or could be bound by the submission and award, to pay, and he was bound; it was a sufficient assignment of a breach of the condition of his bond, to allege that he had not paid the money, awarded in favour of the plaintiffs.

Upon the whole, it is the opinion of this Court, that there is no error in the judgment of the Circuit Court, and the same is affirmed, with costs and damages.

JUNIUS K. HORSBURG, DEVISEE OF JAMES HENDERSON, APPELLANT, *vs.* MARTIN BAKER AND HANNAH HIS WIFE, FRANCIS CLARK, ROBET BOYCE, AND PETER MASON, FOR HIMSELF, AND AS GUARDIAN TO SUSANNAH R. HAMLETT.

A Court of Chancery, is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. {236}

After an answer and discovery, the rule is, that a suit brought, merely for discovery, cannot be revived. The object is obtained, and the plaintiff has no motive for reviving it. {236}

A bill had been filed originally for discovery, and afterwards became a bill for relief. The relief prayed for, was a forfeiture; which might be enforced at law. Under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismission should have been without prejudice to the legal rights of the parties, as an absolute dismission might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. {236}

ON an appeal from the Circuit Court, for the district of Kentucky. The facts and the pleadings in the case, are fully stated in the opinion of the Court.

The cause was argued by Mr. Wickliffe, on the part of the appellants; no counsel appearing for the appellees. The following points were stated in the argument, by Mr. Wickliffe.—

1. The loan made in 1784, and as further evidenced, by the deed of confirmation of 1787, was valid, as between the parties to it; and as Baker and wife are proved, in 1813, to be in possession of the negroes, and of a copy, or the original deed of 1781 is admitted, they are estopped from asserting any title to said slaves, which they may have had prior to that deed.

2. The deed of 1787, having been duly recorded in the proper office, on the 4th of July 1787, was notice to all the world; and the subsequent removal of the slaves out of the state of Virginia, without the knowledge and consent of Hosburg, did not destroy the legal effect of that deed, or convert the loan into an absolute title, in Baker and wife.

3. Baker and wife cannot rely upon the lapse of time, or the length of possession, to defeat the right of Horsburg, and those claiming under them.

4. The Court, in this cause, had jurisdiction upon two grounds; the one, arising from the nature of the contract, and its subject matter; the other, from the peculiar circumstances of the case, the difficulty of proving and identifying the slave Charlotte and her increase, without the aid of a discovery on oath; and the repeated attempts by the defendants, and the just

fears of the complainant, that the negroes would be secreted, and removed out of the jurisdiction of the Court.

When Courts of Chancery take jurisdiction upon the ground of discovery, or upon any other ground, they will retain the cause for the purpose of granting full relief.

By the Act of Assembly of Virginia, of 1758, a parol gift of slaves was void. 1 *Wash. Rep.* 339, 331.

The parties to a trust of real or personal property, may resort to a Court of Equity to avail themselves of its benefits. 1 *Mad. Chancery*, 446.

Between the *cestuy que trust*, and his trustee, the statutes of limitation, or lapse of time, are no bar. 1 *Mad.* 453. 2 *Vez.* 680.

Baker and wife were trustees of the slave and her issue, for the persons entitled to the reversion of them, under the deed of Alexander Horsburg; and they were not authorized to dispose of them; and the sale made by them, while the suit was pending, was void as to the *cestuy que trust*. 2 *Johns. Chan. Cas.* 441. 4 *Ibid.* 136.

As to jurisdiction in this cause, and it being a case for relief in Chancery. 3 *Vez. jun.* 71.

Slaves, the property of the wife, vest in the husband without being redeemed into possession. 1 *Mar. Rep.* 517.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

In the year 1813, James Henderson and his wife, filed their bill in the Court of the United States, for the seventh circuit, and district of Kentucky, stating, that Alexander Horsburg, the former husband of the plaintiff, did, by deed, bearing date the 25th day of April, in the year 1787, confirm to Martin Baker, and Hannah his wife, for their lives and the life of the survivor, then residing in the county of Halifax, in Virginia, a negro girl named Charlotte, previously loaned to them; (which deed was recorded,) reserving to himself and his heirs, the reversion of the said slave, and her increase; and prohibiting any alienation of them, under the penalty of forfeiting the loan.

This deed was recorded on the 4th day of July 1787, in the Court of Hustings, for the town of Petersburg; the town in which the said Horsburg resided. The bill further states, that the said Alexander Horsburg departed this life in the year 1798, having first made his last will in writing, whereby he bequeathed the residue of his estate to his wife, who afterwards intermarried with the plaintiff, James Henderson.

The bill proceeds to state, that Martin Baker and wife have removed to Kentucky with the slave Charlotte, and her increase; whom they profess to hold as their absolute property; and that the plaintiffs fear, that they will be secreted, or conveyed

out of the state to places unknown. The plaintiffs further allege, that they are unable to prove the identity of the said slaves, and pray that the said Baker and wife may be compelled to discover their number, and names; and may be decreed to give security for their forthcoming, when the life estate should determine.

The Court awarded an injunction, to restrain the defendants from removing Charlotte, and her issue, out of the state.

In May 1814, the plaintiff, James Henderson, filed an amended and supplemental bill, stating the death of his wife, and praying that the suit might be continued in his name. The bill also states, that Baker and wife had sold Charlotte and her increase to Francis Clarke and Robert Boyce; who intend removing them out of the state, and concealing them. It prays that the slaves may be rendered to the plaintiff, and that Clarke and Boyce may be restrained from removing them. The Court extended the injunction to the other defendants. The defendants, Baker and wife, file their answer denying the loan; and insisting that certain friends of the defendant, Hannah, subscribed the sum of forty-three pounds, which was placed in the hands of Alexander Horsburg, to purchase the slave Charlotte for her. They insist on their title, but give a full description of all the descendants of Charlotte.

The defendants, Clarke and Boyce, also deny the right of the complainant.

In 1817, the plaintiff again amended his bill, and charged. that Baker and wife had brought the deed from Horsburg with them into Kentucky, as their title to Charlotte.

In November 1819, Junius K. Horsburg appeared, by his attorney, and leave was given him to file a bill of revival. The bill is filed by the said Horsburg, as the administrator and devisee of James Henderson, and as the heir and only child of Mrs. Henderson, the wife of the said James, and the former wife and devisee of Alexander Horsburg.

The bill recites the previous proceedings in the cause—exhibits the will of James Henderson, and his letters of administration, and charges the sale to Boyce and Clarke, since the institution of this suit, who purchased at a low price, with the intention of removing the slaves beyond the jurisdiction of the Court.

In answer to this bill, Baker and wife say, that, in the year 1773, Thomas Simmons, and others, named in the answer, contributed forty-three pounds, for the purpose of purchasing a negro girl, for the said Hannah, which sum was placed in the hands of Alexander Horsburg, as their agent, with instructions to convey the said negro to the defendants for their lives, and to their children, after the death of the survivor. They believe

this plan was adopted, for the purpose of protecting the property thus given by her friends, from the creditors of her husband. Under these instructions, Charlotte was purchased, and delivered to them. In the year 1787, after the defendants had been in peaceable possession of Charlotte, about fourteen years; the said Horsburg, without any previous communication of any sort, sent to them, then residing in Halifax, about 120 miles from Petersburg, the deed; a copy whereof is annexed to their answer. They also say, that, on the same day, the said Horsburg executed another writing, obliging himself to convey Charlotte and her increase, after the death of the defendants, to their children, to which they refer, as being filed in the office of the Circuit Court for the county of Garrard. They also refer to a letter, written by the said Horsburg, which they say was given up to be filed in the cause.

In May 1824, leave was given to file an amended bill, and the cause was sent to the rules for further proceedings.

The amended bill charges, that Clarke and Boyce purchased, not only pending the suit, but with knowledge in fact thereof;—that they purchased the said slaves for a trifle, less than half their value, in consequence of an agreement to take upon themselves the risk of the title.

The deposition of John T. Mason states, that the deponent, as counsel for the original plaintiff, called on the defendants, Baker and wife; who, after some time, admitted, that they claim Charlotte and her offspring, under a deed, from Alexander Horsburg, which they showed him.

It is a copy, or the original of the deed, filed in the cause. They also showed the witness several other papers and letters in relation to the subject, and particularly two letters from Alexander Horsburg, which he believes to be the same, or to the same purport, with those filed in the cause.

The copy of the deed of 1787, recorded in the Court for the town of Petersburg, is filed, together with the will of Alexander Horsburg, and of James Henderson; but neither the subsequent deed, stated in the answer of Baker and wife to have been executed by Alexander Horsburg, for the purpose of securing Charlotte and her offspring, to the children of Baker and wife, nor the letters from Horsburg, are found on the record.

The last amended bill was taken for confessed, and the cause set down for hearing. The Court directed the bill to be dismissed.

Baker and wife being alive, the plaintiff could have no pretence to recover the slaves claimed by the amended bill, except under the clause of forfeiture for alienation, which the deed contains.

(Horsburg *vs.* Baker et al.)

As a Court of Chancery is not the proper tribunal for enforcing forfeitures, no decree for the purpose of effecting that object, ought to have been made. But the plaintiff had a right to apply to the Court of Chancery for a discovery, in order to enable him to proceed at law, either immediately, or on the death of Martin Baker and his wife; and also, for an injunction, to restrain the tenants for life from removing the slaves out of the country. The decree dismissing the bill, entirely defeats both these objects.

The bill, therefore, ought not to have been dismissed, unless the plaintiff had failed to show any title which might be litigated in a Court of law. The Court will not, in this case, decide upon the title; but is of the opinion, that it authorizes the plaintiff to come into a Court of Chancery to pray for a discovery; and, as there was reason to fear that the property would be removed, to obtain security for its forthcoming, if the title should be determined in his favour. This bill was, in its origin, merely a bill of discovery, and *quia timet.* Before the answer was filed, the original defendants are alleged to have sold the slaves, and, by that act, to have forfeited their life estate. The amended bill, therefore, prays a decree for the slaves themselves. After this bill was filed, the defendants, Baker and wife, answer; and make the discovery with respect to the descendants of Charlotte.

In this state of the cause, the plaintiff *dies*, and his administrator and devisee, files a bill in the nature of a bill of *revivor.*

After answer and discovery, the rule is, that a suit brought merely for discovery, cannot be revived. 1 *Mad.* 217. 1 *Dick.* 133. 10 *Vez.* 31. Its object is obtained, and the plaintiff has no motive for reviving it. But such a bill ought not to be dismissed, 1 *Mad.* 217. 1 *Atk.* 286.

The Court might properly order, that no further proceedings be had in the case. Had this bill, then, been merely a bill of discovery; at the death of the original plaintiff, it ought not to have been sustained in the name of his devisee; because the discovery was made. But it had then become a bill for relief. The relief, however, prayed, is for a forfeiture, which might have been enforced at law. The present plaintiff was in possession of all the evidence which was necessary to support his action at law, and was not driven into a Court of Chancery for the purpose of obtaining its aid. In such circumstances, it was proper to dismiss the bill, so far as it sought relief on the ground of forfeiture; but it ought to have been dismissed, without prejudice to the legal rights of the plaintiff; an absolute dismission may be considered as a decree against the title.

The decree, therefore, is to be reversed, and the cause re-

manded, with directions to dismiss the bill, so far as it asks relief; without prejudice.

The injunction may be continued in the discretion of the Court, till the plaintiff has time to institute a suit at law.

This cause came on, &c., on consideration whereof, This Court is of opinion, that, after the discovery sought by the original bill was obtained, the suit ought not to have been revived, nor ought the bill, in the nature of a bill of revivor, to have been entertained; because the relief sought by that bill, was solely to enforce a forfeiture, to which the plaintiff's title, if he has any, is complete at law. It was therefore proper to refuse the relief for which that bill prayed; but as a general decree for a dismission on the merits, may be considered as a decree against the title, on which the Court ought not to have decided, the bill ought to have been dismissed, without prejudice. It is, therefore, the opinion of this Court, that there is error in so much of the decree of the Circuit Court, as dismissed the bill of the plaintiff generally; and that the said decree ought to be reversed, and the cause remanded to the Circuit Court, with directions to dismiss so much of the plaintiff's bill, as prays relief on the ground of forfeiture; and to continue the injunction at the discretion of the Court.

CHTISTIAN BREITHAUPT, AND HENRY SHULTZ, DEFENDANTS BELOW, *vs.* THE BANK OF THE STATE OF GEORGIA, AND OTHERS.

The complainants are stated, in the bill, to be citizens of the state of South Carolina. The defendant, the Bank of Georgia, is a body corporate, existing under an Act of the legislature; but the citizenship of the individual corporators is not stated. The averment, in the original bill, is, that William B. Bullock and Samuel Hale are citizens of Georgia, and residents therein; William B. Bullock is afterwards designated in the bill, as "President of the Mother Bank, and Samuel Hale, as the President of the Branch Bank at Augusta, in the state of Georgia." The Courts of the United States have no jurisdiction of the case. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations that the stockholders of the Bank, were citizens of that state.

THIS was a bill, filed in the Circuit Court, for the district of Georgia, and the case came up, on a certificate of a division of opinion, which the judges ordered to be entered upon these points.—

First, whether the complainants are entitled to relief?

Secondly, what relief should be decreed to them?

The only question presented for the decision of this Court, was, whether the Circuit Court had jurisdiction of the cause. It was alleged, there is no sufficient averment on the record, of the citizenship of the parties.

The complainants, Henry Shultz, and Christian Breithaupt, are stated to be citizens of the state of South Carolina. The defendant, The Bank of the State of Georgia, is a body corporate; but the citizenship of the individual corporators is not stated. The averment, in the original bill, is, that "William B. Bullock, and Samuel Hale, are citizens of Georgia, residents therein." William B. Bullock is subsequently designated, as "President of the Mother Bank, and Samuel Hale, as President of the Branch Bank at Augusta, in the state of Georgia." There are three amendments to the bill, but there is, in none of them, any further averments. The answer denies the jurisdistion.

The defendant's counsel insisted, that the citizenship of the individual corporators should have been alleged; and that the want of jurisdiction is apparent upon the face of the record.

Mr. M'Duffie, in support of the jurisdiction of the Court, contended, that the objection to the jurisdiction was founded on a misapprehension of the decisions of this Court. None of those decisions go further than to say, that if, on the face of

(Breithaupt et al. *vs.* The Bank of Georgia et al.)

the record, it appears that there are parties, who are not citizens of another state, the Courts of the United States will not accept jurisdiction.

In the bill, the complainants are said to be citizens of South Carolina; and William B. Bullock, the President of the Mother Bank, and Samuel Hale, the President of the Branch Bank, are citizens of the state of Georgia; and there is no ground for the allegation, that other persons, not citizens of the state, are interested. The party who claims the jurisdiction, is not bound to prove that no other persons, but citizens of Georgia, are interested.

The Bank exists under an Act of Incorporation, passed by the state of Georgia, and this Court will look at the Act; which having a general operation, may be considered as a public Act. 1 *Black. Com.* 85. If this is done by the Court, they cannot say others than citizens of Georgia, are members of the Corporation. Cases cited, in which the question of jurisdiction has been examined: 3 *Dal.* 382, Cabot *vs.* Bingham. 5 *Cranch*, 57. 3 *Cranch*, 267. 3 *Wheat.* 591.

The policy of the Constitution, in relation to jurisdiction, is to include suits against corporations, although all who are interested, are not citizens of the same state.

The influence of such corporations, in the state where they exist, makes this appeal to other than state tribunals, expedient. When an action is instituted against trustees by citizens of another state, would the jurisdiction of the Courts of the United States be taken away, by showing that some of those who had a fiduciary interest, were not citizens of the same state with the trustees? The question must be settled, by adverting to the local usages of Georgia; and there suits are brought against the individuals who represent the Bank.

Mr. Berrien, and Mr. Wilde, for the defendant.

The pleadings show that there is no allegation of citizenship in the stockholders of the bank, the owners of its funds; and the point is fully settled, that all the parties who are sued, shall be averred to be citizens of another state, from that of the plaintiff or complainant in the suit.

A body corporate, as such, is incapable of citizenship, according to the true meaning of the law giving jurisdiction.

This Court has decided, that they will go behind the act of incorporation, and ascertain the character of the individual corporators, and if they find them citizens of another state, the suit may be maintained; but there must be an averment of such citizenship, as to every stockholder. 5 *Cranch*, 57. 6 *Wheat.* 146.

The possession of the fund cannot give the Court jurisdiction, as that was the possession of a corporation. No juris-

diction can be obtained, because of the difficulties in suits against the corporation of one state, by citizens of another; and it is denied that any such difficulties exist in Georgia.

By the Court.—This is not a case within the jurisdiction of the Courts of the United States. The record does not show, that the defendants were citizens of Georgia, nor are there any distinct allegations or averments, that the same was the fact, as to the stockholders in the bank.

This cause came on, &c., on consideration whereof, This Court is of opinion, that as the bill does not aver that the corporators of the Bank of the State of Georgia, which bank is defendant in the suit, are citizens of the state of Georgia, the Circuit Court has no jurisdiction of the cause, and can grant no relief. It is therefore ordered to be certified to the Circuit Court, as the opinion of this Court, that, in the present state of the pleadings, it not appearing that the defendants are citizens of the state of Georgia, the complainants are not entitled to relief in that Court.

JAMES FINDLAY, WILLIAM LYTLE, CHARLES VATTIER, ROBERT RITCHIE, AND OTHERS, CITIZENS OF OHIO, APPELLANTS, *vs.* THOMAS S. HINDE, AND BELINDA HIS WIFE, CITIZENS OF KENTUCKY, APPELLEES.

If, in a case where the *loss* of a deed or other instrument, is made the ground for coming into a Court of Equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer to the bill; yet, if the party charged by the bill failed to demur for that cause, but answered over to the bill, or permitted it to be taken for confessed, by default, against him; it *seems*, that the absence of the affidavit is not a sufficient cause for the reversal of the decree. {244}

If a deed has not been proved, acknowledged, and recorded, and would therefore be insufficient against subsequent purchases, without notice; parties who claim under such deed, have a right to come into a Court of Equity, for a discovery, upon the ground of notice; and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. {245}

Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate; and upon a receipt of the purchase money, binding the party to convey the estate; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same, {246}

The decree of the Circuit Court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the defendants. All the defendants appealed together, to this Court, some of whom held the legal title to the lot, and all the defendants had an interest in defending this title, standing as they did, in the relation of vendors and warrantees, and vendees. Although the defendants, against whom there is a decree for costs only, could not appeal from this decree for costs; yet, the reversal of the decree of the Circuit Court was made general, as to all of the appellants, and the whole case opened. {247}

THE appellees filed their bill in the Circuit Court of the United States, for the district of Ohio, praying a discovery; and that the defendants may convey to the complainants such a title as they have acquired, to a lot of ground in the town of Cincinnati, and deliver up the possession acquired by them; and also that they account for the profits; and for general relief.

The title set up by the complainants, was alleged to be derived from a receipt given by Abraham Garrison, in whom the title to the lot was then vested, which receipt was in the following terms:—

"Received, Cincinnati, 10th September 1799, of Wm. and

Michael Jones, fifty pounds thirteen shillings and three pence, in part of a lot opposite Mr. Conn's, in Cincinnati, for two hundred and fifty dollars, which I will make them a warrantee deed for the same, on or before the twentieth day this instant.

Test, Jacob Awl. Signed, ABRAHAM GARRISON."

And from a deed, executed on the following day, by which Abraham Garrison, for the consideration of 250 dollars, conveyed the lot to William and Michael Jones, which deed was said to have been lost by time and accident. The lot was, by subsequent conveyances, claimed to be vested in the complainants. No affidavit is attached to the bill, showing that the deed was not in the complainants' possession, or setting forth that it had been so lost or destroyed.

To this bill, the defendants, James Findlay, Charles Vattier, William Lytle, and Robert Ritchie, answered separately; and a decree was entered against the other defendants for costs, the bill having been taken *pro confesso* against them, they not having answered.

After hearing, this Court gave a decree against the defendants who had answered; and all the defendants appealed to this Court.

The bill, answer, exhibits, and depositions, showed a case containing many controverted facts and allegations; and the questions of law arising upon the same, were elaborately argued by Mr. Webster and Mr. Caswell, for the appellants; and by Mr. Dodridge and Mr. Jones, for the appellees.

The decision of this Court, by which the decree of the Circuit Court of Ohio was reversed, and the cause remanded for further proceedings, was upon two questions of chancery practice; which were raised by the counsel for the appellants.

1. The Court have decreed relief to the complainants, on the bare suggestion that the deeds once existed, which are lost, when no affidavit is attached to the bill, showing that the deeds were not in complainant's possession; and without such an affidavit a Court of Chancery has no jurisdiction of the cause. The appellants cited the following cases, to show the error of this proceeding. *Mitford's Pl.* 52, 112. 2 *Pére Williams*, 540, 541. 3 *Atk.* 17. 132. 4 *John. Ch. Rep.* 297.

2. The complainants not having shown a deed from Garrison to the Jones's, must rely upon the receipt from Garrison to the Jones's, as an equitable title; and if they claim that equitable right, they of course must make Garrison, the elder, and the Jones's, parties to the suit. Upon this point, the counsel for the appellants cited Simms *vs.* Guthrie and others. 9 *Cranch* 25.

No opinion having been expressed by the Court, upon the merits of the cause, or upon the general questions presented by

(Findlay et al. vs. Hinde & Wife.)

the counsel; it is not deemed proper to state the arguments of counsel, in this report.

Mr. Justice TRIMBLE delivered the opinion of the Court.—

This is a contest for lot number 86, in the city of Cincinnati. The appellees, who were complainants in the Court below, claim the lot, in right of the complainant, Belinda, as half-sister and heir at law of Thomas Doyle, Jun. only son of Thomas Doyle, the elder.

In the year 1795, Abraham Garrison became the proprietor, and was seised in fee of the lot in controversy.

The bill charges, that on the 10th of September, 1799, Abraham Garrison, being so seised, sold the lot to William and Michael Jones, brothers, and partners in trade, for the price of 250 dollars; part of which being paid, the said Abraham Garrison gave a receipt for the same, binding himself to convey; which receipt is annexed, and made part of the bill: That a few days after, the said Abraham Garrison made a deed of conveyance, attested by two witnesses, to the Jones's, for the lot; which deed has been lost by time and accident: That on the 26th of March, 1800, William Jones, in behalf of the firm of William and Michael Jones, conveyed the lot to Thomas Doyle, jun.; and that although the intention of that conveyance was to pass the title of both partners, and is in equity good for that purpose; yet, as it did not pass the legal title of Michael Jones, he has since, in the year 1819, for the purpose of confirming the title of the complainants, made a deed of confirmation to the complainant, Thomas S. Hinde.

Various other matters are stated in the bill, as strengthening and confirming the equitable right of the complainants, in right of the said Belinda, as heir at law of Thomas Doyle, jun.

The bill charges, that the defendants have fraudulently, and with notice of the claim of Thomas Doyle, jun. and of the complainants, subsequently, obtained conveyances of the legal title, from and under Abraham Garrison, and seeks discovery and relief.

The defendants, James Findlay, William Lytle, Charles Vattier, and Robert Ritchie, answered; and the bill was taken as confessed, against the other defendants, for want of answer.

The answer put in issue, generally, the allegations of the bill, and the title of the complainants; but it is not at present necessary to say, whether they do or do not, sufficiently, deny notice.

It appears, from the answers, and title deeds filed in the cause, that all the defendants, as well those who have not answered, as those who have, are interested in defending the title

of the lot: they standing in relation to each other as vendors, warrantees, and vendees.

At the hearing of the cause, in the Circuit Court, the defendants; Vattier and Ritchie, were decreed to convey to the complainants; and costs were decreed against all the defendants; and all of the defendants have joined in the appeal to this Court.

The appellants contend, that the decree is erroneous, upon several grounds, which have been very elaborately argued at the bar. Among these, two preliminary objections have been raised, to the regularity of the proceedings and decree; and if either of them be sustained, it will be unnecessary to consider the more important objections made to the decree, upon the merits of the conflicting claims of the parties.

The first preliminary objection is, that no affidavit of the loss of the deed, from Garrison to the Jones's "by time and accident," as charged in the bill, was made and annexed to the bill.

In support of this objection, the counsel for the appellants have cited numerous authorities, to prove, that when the *loss* of a deed, or other instrument, is made the ground for coming into a Court of Equity, for discovery and relief, an affidavit of its loss must be made, and annexed to the bill—and, that the absence of such affidavit, is good cause of demurrer to the bill. But no case has been cited, and none is recollected, in which it has been decided, that although the party charged, failed to demur for that cause, but answered over to the bill, or permitted it to be taken for confessed, by default, against him, yet the absence of the affidavit is sufficient cause for a reversal of the decree.

If such a decided case were shown, we should exceedingly doubt its reason and authority.

The objection appears to us to be of that character, which ought to be made at the earliest practicable stage of the cause; and if not then made, should be considered as waived. Upon the face of the bill there is an apparent jurisdiction, and the use of the affidavit is only to show, *prima facie*, the truth of the matter.

It is not like the cases in which there is an apparent want of equity, on the face of the bills, admitting all the facts stated to be true; nor like the case, in which it is apparent, on the face of the bill, that a Court of Equity could have no jurisdiction of the matters charged. In such cases, although a demurrer will be to the bill, yet none is necessary; inasmuch as there is either an absolute want of equity, or of jurisdiction.

We think the supposed former existence and loss of the deed from Garrison to the Jones's, was not the only ground for ap-

pealing to a Court of Equity for relief. If the deed, as stated in the bill, were produced, it, in consequence of not being proved, or acknowledged and recorded, would be insufficient as a legal title against subsequent purchasers, without notice. The complainants had a right to a discovery, upon the ground of notice, against the defendants; and if notice should be brought home to them, the complainants had a right to relief, by a decree quieting the title, &c.

Again: If the complainants should fail, as we think they have failed, to prove, by competent and satisfactory evidence, the former existence, execution, and contents of a formal deed of conveyance, sufficient to pass the legal title; we perceive no reason why they might not rely upon the executory contract contained in the receipt; and in this latter view of the case, the jurisdiction of the Court of Equity is unquestionable; and a general demurrer to the whole bill, for want of an affidavit, would not be sustainable. At most, a demurrer to only so much of the bill as stated and relied on the deed, could have been maintained for want of an affidavit of its loss.

The second preliminary objection to the proceedings and decree, is the want of proper parties.

It has been argued, for the appellants, that Abraham Garrison was a necessary party; and, that as the complainants claim through him by an executory contract; he ought to have been before the Court before any decree could be made against the defendants; who also claim through and under him, by a subsequent conveyance of the legal title.

The counsel for the appellees endeavoured to overcome this objection, by arguing, that the deed from Garrison to the Jones's, conveyed the title from him to them; that the contract was, therefore, not executory, but executed between Garrison and the Jones's; and further, if it were not so, that there was no necesssity for bringing Garrison before the Court; he having conveyed away the legal title to the appellants; and that therefore no decree could be made against him.

We have already said, the evidence in the cause does not establish a formally executed conveyance from Garrison to the Jones's, sufficient to convey the legal title; and that the complainants are therefore driven to rest their case upon the executory contract, contained in the receipt.

Under this aspect of the case, was it necessary to make Garrison a party, to enable the Court to pronounce a decree between the parties, really before the Court?

In the case of Symmes *vs.* Guthrie, 9 *Cranch*, 25, this Court declared the general rule to be, that, "regularly, the claimants who have an equitable title, ought to make those whose title they assert, as well as the person for whom they claim a con-

veyance, parties to the suit." "And that for omitting to do so, an original bill may be dismissed."

In the case of Mallon and others *vs.* Hinde, 12 *Wheat.* 193. 196, the complainants claimed a survey in the military district, in Ohio, by virtue of certain executory contracts, with Elias Langham, and the heirs of Sarah Beard; and sought, by their bill against Hinde, to obtain a conveyance from him of the legal title; which, it was alleged, he had fraudulently obtained, with notice of the complainants' prior equity. Langham, and the heirs of Sarah Beard, were not made defendants; and for that cause, the decree was reversed. There is no distinction, in principle, between that case and this. In that case, this Court, in delivering its opinion, hold the following language: "For the appellees, it is insisted the proper parties are not before the Court, so as to enable the Court to decree upon the merits of conflicting claims. And we are all of that opinion." "The complainants can derive no claim in equity to the survey, under or through Langham's executory contract with the Beards, unless these contracts be such as ought to be decreed against them, specifically, by a Court of Equity." "How can a Court of Equity decide, that these contracts ought to be specifically decreed, without hearing the parties to them? Such a proceeding would be contrary to the rules which govern Courts of Equity, and against the principles of natural justice."

This reasoning applies with equal force to the case at bar. Here, however perfect all the other links may be in the chain of the complainant Belinda's equitable title to the lot in contest, she can have no claim to it in equity, but through and under the executory contract of Garrison with the Jones's. Garrison has a right to contest the equitable obligation of that contract. No decree can be made for the complainants, without first deciding, that the contract of Garrison ought to be specifically decreed. He might insist the purchase money had not been paid, or make various other defences. It is not true, that if he were made a party, no decree could be made against him. It might not be necessary to require him to do any act, but it would be indispensable to decide against him the invalidity of his obligation to convey, and overrule such defence as he might make; and if the purchase money had not been paid, to provide by the decree for its payment, before any decree could be made against the defendants holding the legal title. We are all of opinion, that upon this second preliminary objection, the decree of the Circuit Court must be reversed.

A question of some difficulty presents itself, as to the extent of the reversal. The decree of the Circuit Court directs the defendants, Ritchie and Vattier, to convey certain portions of

the lot of ground; and awards costs, generally, against all the defendants. There is no doubt, the defendants, against whom there is only a decree for costs, could not appeal alone, from the decree of costs. But the defendants, below, have all appealed together, and although some of them hold the legal title to the lot, yet they all have an interest in defending the title; standing as they do, in the relation of vendors and warrantees, and vendees. Under these circumstances, we think the reversal should be general, as to all of the appellants, and the whole case opened. And we are the more inclined to adopt this course, because, so numerous, and so great, have been the irregularities in conducting the cause in the Court below, from its commencement to its termination, by decree; that it seems impracticable that justice be done between the parties, without sending the cause back, as to all the parties; with directions, that the complainants have leave, if asked by them, to amend their bill, and make the proper parties; and to proceed *de novo* in the cause, from filing such amended bill.

This cause came on, &c. on consideration whereof, It is the opinion of this Court, that there is error in the proceedings and decree of said Circuit Court, in this, that Abraham Garrison ought to have been made a party, but was not, before a decree was made between the parties in the cause. Whereupon it is adjudged, decreed, and ordered, that the decree of said Circuit Court, for the district of Ohio, in this cause, be and the same is hereby wholly reversed, annulled, and set aside. And it is further ordered, that the cause be remanded to the Court from whence it came, with instructions to permit the complainants, upon application for that purpose, to amend their bill, and to make proper parties, and to proceed *de novo* in the cause, from the filing of such amended bill, as Law and Equity may require.

OLD GRANT, ON THE DEMISE OF SAMUEL MEREDITH, PLAINTIFF IN ERROR, *vs.* JOHN M'KEE, FOR THE USE OF THE BANK OF THE COMMONWEALTH OF KENTUCKY.

The Court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded two thousand dollars; the title to a lot of ground, part of the whole tract, which was of less value than five hundred dollars, was only involved in the case before the Court.

MR. WICKLIFFE moved to dismiss this cause, which was brought by a writ of error from the Circuit Court of the district of Kentucky; on the ground, that the property in controversy was not of the value of two thousand dollars; although the whole property owned by the lessor of the plaintiff in errror, was under a patent, and which was recovered in the ejectment, is one thousand acres; yet, the title to a lot in the town of Falmouth, of less value than five hundred dollars, held under the patent, is only involved in this case, and can only be affected by the decision of this Court.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This is a writ of error to a judgment of the Court of the United States, for the Seventh Circuit, and the district of Kentucky, awarding restitution of lot No. 108, in the town of Falmouth, to the defendants in error; who had been turned out of possession, by virtue of a writ of *habere facias possessionem*, issued on a judgment in ejectment, in favour of the plaintiff in error.

Previous to the institution of the suit, the town of Falmouth had been laid out, in pursuance of an Act of Assembly, and lot No. 108 had been sold and conveyed to George Hendricks. The law establishing the town of Falmouth, directed that the lots should be sold, subject to the condition of making certain improvements thereon, within seven years; on failure to do which, the trustees are empowered to enter on any lot not improved, and sell it again. These improvements were not made on lot No. 108.

The defendant in error moves to quash the writ of error, because the matter in controversy is not of the value of 2,000 dollars. The motion is resisted, because the whole property which was recovered in the ejectment, may be considered as involved in this motion; since each tenant may move separately for an award of restitution, on the supposition that the regularity of the proceedings, under the law by which the town

was established, and the lots sold, may be examined; on this motion, the plaintiff in error has brought that subject into view, and has discussed it fully. But the Court is of opinion, that the question of title cannot be considered on this writ of error. The town of Falmouth was separated from the tract out of which it was taken, and this lot was sold before the suit was instituted; neither the trustees of the town, nor the proprietors of the lot, were parties to that ejectment. The motion to award restitution, therefore, involved nothing further than the lot to which the party prayed to be restored; and as that is not of the value of 2,000 dollars, the Court has no jurisdiction. The writ of error is to be dismissed.

Writ of error dismissed for want of jurisdiction; it not appearing that the value of the premises, in this suit, is two thousand dollars.

WILLIAM KONIG, WHO IS AN ALIEN, PLAINTIFF BELOW, *vs.* WILLIAM BAYARD, WILLIAM BAYARD, JR. ROBERT BAYARD, AND JACOB LE ROY, CITIZENS OF THE STATE OF NEW-YORK.

A stranger to the drawer and endorser of a non-accepted bill of exchange, may intervene *supra* protest, to pay the same for the honour of an endorser or drawer. {262}

It is no objection to this intervention, that it has been done at the request, and under the guarantee of the drawees of the bill; who had refused to accept or pay the same. The arrangements made by the payer of the dishonoured bill, with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill, for whose honour it has been paid. {262}

If A, at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra* protest, for the honour of the endorser, the party against whom suit is brought for the amount paid, may avail himself of every defence which he could have had, if the bill had been paid *supra* protest, for the honour of the endorser, by the drawee, and suit brought for the same. {262}

THIS was an action of assumpsit, instituted in the Circuit Court of the United States, for the southern Circuit of New-York; by William Konig, a merchant of Amsterdam, carrying on business under the firm of William Konig & Co. against the defendants, merchants in New-York, trading under the firm of Le Roy, Bayard & Co.

The action was upon a foreign bill of exchange, and the declaration charges, that the same was drawn at Baltimore, on the 2d day of September, 1822, by John C. Delprat, on N. & J. & R. Van Staphorst, of Amsterdam, in Holland, at sixty days sight, for 21,500 florins, in favour of the defendants, and made payable to them, or order. That the defendants, on the fourth of September, in the same year, endorsed the same to L. H. Huder, who endorsed it to Rougemont & Behrends—and that they, on the 25th of November, 1822, presented the bill, (the same being unaccepted and unpaid,) to the drawees, for acceptance, by whom acceptance was refused, and the bill protested for non-acceptance; and that the plaintiff on the same day, at Amsterdam, to prevent the bill from being sent back to the defendants, did, under that protest, and for the honour and account of the defendants, accept the bill, in writing, and gave notice thereof to the defendants.

That the bill was afterwards, and before payment, endorsed by Rougemont & Behrends to N. M. Rothschild, who endorsed it to M. Rothschild & Sons, who endorsed it to B. J. De Jongh & Fils; and the last endorsees, when the bill became due

and payable, viz. on the 25th of January, 1823, at Amsterdam, presented it to the drawees for payment; that payment was refused; and the holders, being the last endorsees aforesaid, caused the bill to be protested for non-payment; and the plaintiff thereupon, upon the protest, and for the honour and account of the defendants, the first endorsers, paid the bill to B. J. De Jongh & Fils, together with two thousand guilders for the cost of the protest, and other charges, and gave due notice thereof to the defendants.

The declaration also contained the usual money counts; upon which the general issue was pleaded; and upon the trial of the cause, a verdict was taken for the plaintiff, for 9852 dollars 78 cents; subject to the opinion of the Court on the following case; with liberty to either party to turn the same into a special verdict, or bill of exceptions.

It was admitted that the bill was drawn by John C. Delprat, in favour of defendants; and that on the 18th day of October, 1822, the defendants endorsed it, and transmitted it to Messrs. Rougemont & Behrends, at London; and that afterwards the bill was endorsed by Messrs. Rougemont & Behrends to N. M. Rothschild, who endorsed it to M. Rothschild & Sons, who endorsed it to B. J. De Jongh & Fils, as charged in the declaration. And in order to prove that the bill was duly protested for non-acceptance and non-payment, and that after the same was so protested for non-acceptance, the same was accepted, *supra* protest, by the plaintiff, for the honour and account of the defendants, the endorsers; and that after the said bill was protested for non-payment, the same was paid, *supra* protest, by the plaintiff, for the honour and account of the defendants, the endorsers; the plaintiff read in evidence the protest for non-acceptance and non-payment, which were admitted by the counsel of the defendants to be read in evidence for that purpose.

The endorsements on the bill were:

Pay Mr. L. Huder, or order, value received. New-York, 4th Sept. 1822. Signed, Le Roy, Bayard & Co. Pay to the order of Messrs. Rougemont & Behrends, of London, value in account. New-York, 1st October, 1822. Signed, L. H. Huder. Dec. 28, No. 279, presented for stamp at Amsterdam, 22d Nov. 1822. Received with the augmentation, fl. 13 75. Signed, Elvester.

The protest for non-acceptance, stated, that on the application of the notary to the drawees, N. & J. & R. Van Staphorst, Amsterdam, they refused to accept the bill, stating, "that whereas the drawer has quite wrongfully drawn his bill, we, therefore, cannot accept the same, and moreover regret, that in order to preserve our just rights against him, (meaning the

drawer,) we cannot even interfere in behalf of those to whom this bill was passed."

The protest also stated the following "Act of Intervention:"

And forthwith appeared and came forward, those same gentlemen, Messrs. Wm. Konig & Co., who declared that they were actually ready, on account, and for the honour of the firm of Messrs. Le Roy, Bayard & Co. as endorsers upon this same bill of exchange, to accept the said bill, and for the purpose of paying the amount thereof on the day of its maturity; and accordingly, the same gentlemen, Messrs. Wm. Konig & Co., in fact did, and have signed the same.

The protest for non-payment, stated the same answer to have been given by the drawees, when payment of the bill was demanded, as made when acceptance was applied for, and also that, after the protest for non-payment.

Subsequently, the gentlemen, Messrs. Konig & Co. commission merchants, residing in this city, at the Cloveniers Burgwal, duly patented for the past year, as appears by their certificate, dated 24th June, No. 1333, to us the Notaries exhibited, who, after having previously examined and read the aforecopied bill of exchange, as likewise this present protest, declared, that they, in consequence of their acceptance, under protest, should honour and pay this bill of exchange, and which, in fact, they have done, for the honour and on account of Messrs. Le Roy, Bayard & Co., as the first endorsers thereon, reserving, at the same time, their right against them, and all the others thereby interested.

The following letters were offered in evidence on the part of the defendants, and objected to on the part of the plaintiff; but the objection being overruled by the Court, they were read in evidence as follows:—

Messrs. Rougemont & Behrends, London.

New-York, 18*th October* 1822.

Gentlemen—We have now simply to request you to obtain acceptance of the enclosed draft; we do not wish it negotiated until it should be first accepted, either for the honour of the drawer, or for ours and endorsers; we only wish that it may appear as having been sent to you for negotiation by the last endorser. It is drawn by the agent of the Amsterdam house, and as we enclose it as such, we wish it to be returned with the regular formality of law, should it not, contrary to our expectations, be accepted.

With respect, we are, &c.

Le Roy, Bayard & Co.

(Konig *vs.* Bayard et al.)

It was admitted, that the above letter was not transmitted, nor the contents thereof communicated by Messrs. Rougemont and Behrends, to the plaintiff.

ROUGEMONT & BEHRENDS to Messrs. WILLIAM KONIG & Co. Amsterdam.

London, 19*th November* 1822.

We beg you to have the enclosed accepted 1st of fl. 21,500, 60 days on N. & J. & R. Van Staphorst, and hold the same to the disposal of the 2d, 3d, and 4th. You will oblige me by mentioning the day of acceptance, and, in case of refusal, you will have the bill protested. If accepted, please let us know the amount of stamp duties, &c.

The defendants also read in evidence the following extracts of letters from the plaintiff to Rougemont & Behrends.

Amsterdam, 22*d November* 1822.

Messrs. ROUGEMONT & BEHRENDS, London.

We had this pleasure 19th instant, and are to-day in possession of your favour. The enclosed fl. 21,500 on N. & J. & R. Van Staphorst, will be presented for acceptance, and kept to the disposal of duplicate; for stamp duty we debit you in postage account, which is fl. 14.5s. Messrs. Van Staphorst have deferred the answer whether they will accept said bill till tomorrow. We cannot inform you of the result until Tuesday, and in case of refusal will forward you the protest.

Amsterdam, 26*th of November* 1822.

Messrs. ROUGEMONT & BEHRENDS, London.

We refer to our respects of the 22d instant. Messrs. N. & J. & R. Van Staphorst, after having deferred the acceptance of the bill of fl. 21,500, 60 days, till yesterday, now refuse to accept; we had also the bill presented for non-acceptance, at the same time honouring it for account of Le Roy, Bayard & Co. in New-York. The bill has also been accepted on the 25th of November, and will be due on the 24th of January next. We will keep it at the disposition of the 1st, 3d, or 4th, or any copy authenticated by your endorsement.

They also read in evidence the following letters from the plaintiff to the defendants.

Amsterdam, 26*th of November* 1822.

Messrs. LE ROY, BAYARD & Co. New-York.

Gentlemen—Having been charged by Messrs. Rougemont & Behrends of London, to procure the acceptance of a second of exchange of bill of fl. 21,500, Mr. John C. Delprat at Baltimore, of 2d September, to your order, on Messrs. N. & J. & R. Van Staphorst. These gentlemen have refused to accept it, expressing their regret at being unable on this occasion even to protect your signature, and save you heavy damages.

We have determined to offer it, on the assurance that this intervention would be agreeable to you, and we remit you annexed, in consequence, the protest for non-acceptance, and the act of intervention for the fl.21,500, becoming due 24th January—accepted 25th November for your account. At maturity we will send you all the papers in order, and as it appears certain that Messrs. Van Staphorst will not pay the draft of Mr. Delprat, you can at present admit that you will leave it to reimburse us this intervention, with commission, expenses, and interest. We renew, gentlemen, on this occasion, the offer of our services, desirous that it may be agreeable to you to require them.

Amsterdam, 28th January 1823.

Messrs. Le Roy, Bayard & Co. New-York.

Gentlemen—We have the honour to confirm our letter of 26th November, of which a triplicate is annexed, and to inform you that Messrs. N. & J. & R. Van Staphorst, having persisted in their refusal to pay the bill of exchange of fl.21,500, of Mr. John C. Delprat to your order upon them, we have paid it under protest, and act of intervention, for your honour.

Accompanying this you receive the papers consisting of first draft in first and second. 2. Protest of act of intervention. 3. Amount relative thereto. Will you, gentlemen, please to acknowledge the accuracy of this amount, on 24th January, fl.21,647, and credit us the amount.

Amsterdam, 2d September 1823.

Messrs. Le Roy, Bayard & Co. New-York.

Gentlemen—On the 26th of November past year, we informed you of our having intervened with acceptance, for your honour and account, as endorsers, a draft of fl.21,500, John C. Delprat's draft 60 ds. sight, Baltimore, 2d September, in your favour, protested for non-acceptance against the said drawer, while on the 28th January we had the honour to inform you that we had paid the above bill, by intervention, for your account; handing you, at the same time, the original bill duly discharged, together with necessary protest and act of intervention. Since that time we have only received your lines of the 31st January last, by which you thank us for the intervention made by us, but observe, that Messrs. N. & J. & R. Van Staphorst had, at the same time, informed you, that they had guarantied to us the reimbursement of that draft, for which reason you refer us to these gentlemen.

To our letter returning to you duly discharged, and paid by us for your account, the aforementioned bill, you did not give us any reply. Messrs. N. & J. & R. Van Staphorst have only guarantied us in case we should not be able to recover our re-

imbursement from you, for whose account we intervened; and they are thus entitled to ask from us, that we enforce that payment from you, to which measure that guarantee obliges us, and the effect of which we cannot but maintain, so that, in order to obtain that payment which you owe us, we have now valued this day on you at sixty days; $3,600, $3,400, $1,932.80, order Gulian Ludlow, Esq. at the exchange of 50 *stg.*—fl. 22,332, being the exact amount of our intervention, together with interest and charges to this day, as per note annexed, which we recommend to your protection, and request you to honour in payment of the amount expended by us for your account. If you, against our expectation, refuse to pay this bill, we must inform you, that we have given our most strict and precise order immediately to enforce payment by force of law, to which purpose we must then demand from you the original bill paid, with protest, &c. which we request and authorize you, by the present, to deliver to Gulian Ludlow, Esq. of your city, whom we have empowered to give receipt for these documents; which are our property till you have paid us for them. We are obliged to do this act of devoir; in order to obtain final reimbursement; while we hope and trust you cannot take this measure, necessary to us, in any evil light.

We remain, very sincerely, gentlemen,

Your most obedient servants,

WILLIAM KONIG & Co.

The following letter from N. & J. & R. Van Staphorst to the defendants, was also offered in evidence, and objected to on the part of the plaintiff, but the objection being overruled by the Court, was read, as follows:—

Messrs. LE ROY, BAYARD & Co. New-York.

Amsterdam, 25th November 1822.

Gentlemen—We confirm our last respects of 12th inst. and have since received your esteemed letters of the 4th and 5th ult. first of which accuses receipt of our sundry letters up to the 23d of July, inclusive.

The draft advised in your esteemed favour of 5th ult. 60 days sight—No. 368—fl. 7,000—favour John Telfair, meets due honour at presentation to the debit of your account. We have yesterday received letters from Mr. Delprat, dated 10th, 11th, and 15th of October, of which we cannot fail to communicate in a few words the purport. It is such as we might expect; instead of attempting to clear up any of the distressing items alluded to in our letters to him, or to refute any of the arguments which founded our conduct, Mr. D. merely falls on our circulars, as he calls them, (written at the time to only four of those who were owing us moneys at Baltimore, and of which

we annex copy in our defence,) as having injured his credit; and further declaims against an answer, which he had been erroneously informed that we had given in the protest of one of his bills; further, Mr. Delprat chiefly writes, that he is very desirous to have his accounts closed, and sent up to him; so that, all items being properly brought therein, it may be approved by him, and our intercourse finally closed. We, of course, shall not be backward in complying with that wish; and, on correctness and justice, you will easily believe that Mr. Delprat can safely calculate. When we wrote to you our last letters, and therein stated the amount drawn by Mr. Delprat, so much above any thing that prudence or correctness warranted, we were indeed far from prepared for the appearance of a fresh draft of Mr. D., valued (as the French term it) *de but en-blanc*, without any light being spread by the letter of advice atttached to it.

Fl. 21,500—Baltimore, 2d September, at 60 ds. sight in your favour. This draft, confirmed in no letter of Mr. Delprat, and dated at such an ominous time, was calculated to yield much matter to think on. If Mr. Delprat knew of the protests of his former drafts, to what ought this new flourish to serve; if not, what was his intention by drawing such a large sum again over and above all his former dispositions; a valuation which, placing all possible folly and imprudence on our side, it could not yet possibly be thought that we should honour without attempting to explain the matter. We have merely to express our regret at observing again your endorsemeut on the bill, and notwithstanding your silence in your last favour of 4th and 5th instant, with regard to former interventions, in fact rather disagreeable to us, and whatever might be the intentions of Mr. D. at drawing the bill, we were too much your friends, my dear sirs, not immediately to come forward on account of your signature; but consulting our legal adviser on this so strange and surprising incident, we were sorry to find that it was his positive opinion, that in this peculiar case we ought not to value at all this draft, nor in the least manner to allow that such a draft might properly have been issued by the drawer, and thus that we ought not to consider it at all, nor to meddle with it in the least. So firm was our counsel in that idea, that he was completely against our intervening on behalf of any endorser, as being prejudicial to the system we ought to follow with regard to this bill; but he thought that it was proper to note in the protest our reason for non-acceptance and non-intervention. We were thus put in a disagreeable position; as on the one side we did not wish to act contrary to his advice, and to depart from a system which he though necessary to us; and, on the other, we were fully determined, at all events, not to suffer

your signature to go back without being honoured. In this predicament, we applied to our friends Messrs. Wm. Konig & Co. who had the said bill in hand, *informed them of the whole case*, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of above bill; which favour these gentlemen have not refused to us, so that, without our prejudice, and completely without yours, we have duly protected your interest. We are well persuaded you would not wish us to have done any act which we might think detrimental to us, and we thus are confident, that you will duly appreciate our conduct in this truly awkward affair.

The defendants also read in evidence the following letter from them to the plaintiff:—

New-York, January 31st, 1823.

Messrs. Wm. Konig & Co. in Amsterdam.

Gentlemen—We are favoured with your letters of the 26th November, apprizing us that Messrs. Rougemont & Behrends of London, had sent you for acceptance, a draft for fl. 21,500, drawn at Baltimore, by Mr. John C. Delprat, in our favour, at 60 days sight, upon Messrs. N. & J. & R. Van Staphorst, that these gentlemen had refused the acceptance, and that you had intervened for our honour as endorsers; that you had no reason to believe that it would at maturity be paid by the drawers, and that you would thus be called upon to discharge it. Messrs. N. & J. & R. Van Staphorst inform us, under the date of the 25th of November, that they had informed you of *the whole case*, (in relation to this draft,) and had requested you, under their guarantee, to intervene. It remains, therefore, but for us to thank you for the honour which you purposed doing us, and to refer you to Messrs. N. & J. & R. Van Staphorst for a release from the responsibility assumed under their guarantee, and for them.

We have the honour to be, Gentlemen,
Your humble servants,
Le Roy, Bayard & Co.

It was admitted, that the said bill, for fl. 21,500, was drawn several days after the date of it. That the same was drawn by the said John C. Delprat, on his own account generally, and not on any shipment; and that the said bill was drawn after the said J. C. Delprat heard from the defendants, that his bills on Messrs. N. & J. & R. Van Staphorst had been protested. That the said J. C. Delprat sent to the defendants, an order on Messrs. N. & J. & R. Van Staphorst, dated 4th September 1822; (a copy of which order is hereunto annexed;) and that the said bill was sent therewith to the defendants; that there

were other dealings between the defendants and the said John C. Delprat, besides those growing out of the agency of the said John C. Delprat for the Messrs. N. & J. & R. Van Staphorst; that the defendants, in the course of those dealings, during the summer of 1822, loaned to the said John C. Delprat, a large sum of money on his own account, which loans were carried by them into their general account with the said John C. Delprat; and that the said bill was given to the defendants, by the said John C. Delprat, to repay them for the said advances to him, as far as the same would go.

Messrs. N. & J. & R. VAN STAPHORST, Amsterdam.

Baltimore, Sept. 4th 1822.

Gentlemen—You will please hold all balances due to me by you; all the proceeds of goods sold or unsold, shipped in my name, per Virgin and other vessels, to the order and for the use of Messrs. Le Roy, Bayard & Co., and for which this letter will be your sufficient authority.

I remain, with esteem,

Your obedient servant,

JOHN C. DELPRAT.

The Judges of the Circuit Court divided in opinion upon the following points, which were certified to this Court.—

1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted.

2. Whether the plaintiff had a right, under the circumstances, to accept and pay the bill, upon which the suit was brought, for the honour of the defendants; and is entitled to receive the amount thereof, with charges and interest.

The first point was waived by the counsel for the plaintiff; and the whole argument was directed to the second point.

The cause was argued by Mr. Webster, and Mr. Ogden Hoffman, for the plaintiff, and by Mr. D. B. Ogden, and Mr. Oakley, for the defendants.

For the plaintiff.

The contents of the letter of instructions from Van Staphorsts to J. C. Delprat, not having been communicated to the plaintiff, ought not to affect him in any manner. Any stranger has a right to intervene in case of the non-acceptance, or non-payment of a bill of exchange. This is an established usage in commercial operations, and contributes essentially to their safety and certainty. To the drawer and endorsers, it saves the damages on the bill, which would be payable on its return, and prevents other heavy expenses.

The guarantee of the drawees, in favour of the plaintiff, was an arrangement exclusively between the parties; and the defendants have no right to look to it in the transaction.

On the part of the Van Staphorsts, there was no obligation to give the guarantee, and it was an act for the eventual protection of the plaintiff, in case of the inability of the defendants to repay the amount of the bill; and was not given under any supposition of the liability of the drawees to accept or pay the bill.

If either the plaintiff or the Van Staphorsts, could pay the bill separately, both might pay jointly. The person who pays for the honour of another, may look to all the parties to the bill, as well as to the person for whose honour he pays it.

The payment of a protested bill for the honour of another, is only a mode of becoming the holder, and although against the will of the parties to it, they thus become debtors to the payer.

The Common Law, and the law merchant, as part of the Common Law, presumes a general standing request to be made by the drawer and endorsers of an unpaid bill, to every friend, to prevent the dishonour of the bill, and the burthen of heavy damages in consequence of this. If acceptor, *supra* protest, for the honour of an endorser, pays the bill, he may sue the endorser, as he is to be considered as an endorser paying full value for the bill. 1 *Esp. Rep.* 112. *Chitty on Bills*, 441.

For the defendants.—

This mode of proceeding, by the intervention of a third person, prevents and disables the defendants from proving that the Van Staphorsts were bound to accept, and ought to have paid the bill. This action is not upon the bill strictly, but it is for money paid for the use of the defendants, by one who was an entire stranger to them, and had not right to intervene. A suit cannot be brought upon the bill, because by its payment it is extinct.

The plaintiff interfered, not for the honour of the drawer or endorser, but for that of the drawees. Laying aside his agency, he undertakes to pay the bill, at the request of the drawees, and they are liable to him, and have stipulated for his protection.

The general rule of law is, that no man can constitute himself the creditor of another, without his consent, express or implied. 6 *Term Rep.* 310. 1 *Beawe's Lex Merc.* 63–4. The only exception to this rule is, the case of acceptance of a bill, *supra* protest.

The reasons for this rule are—1. The law implies consent of the party for whose honour acceptance is made, from the nature of the *favour* conferred—being gratuitous, and incurring hazard, for the purpose of rendering a service, an acceptor, *supra* protest, may demand recompense for the *credit* given, for whose benefit acceptance is made. And in case he re-draws

on such person, his bill ought to be promptly complied with, *besides a grateful acknowledgment of the favour. Beawe's Lex Merc. pl.* 44. 63, 64.

Thus it appears, that the *motive* of the acceptor must be such as to entitle him to gratitude.

2. The *consideration* in the implied contract, in this case, cannot be solely the benefit conferred on the endorser; as *voluntary* services may be rendered in all other cases, and no contract will be implied.

Can there be an acceptance for the honour of an endorser, under the guarantee of a third person? 1. It confers no honour. 2. Gives no credit. 3. It is not *gratuitous* or *voluntary*. 4. It is not founded on a *consideration*, which can *alone* lay the foundation of such a contract.

Can there be an acceptance for the honour of the payee or endorser, under a guarantee of the *drawee* of the bill?

1. The drawee cannot do indirectly, what he cannot do directly. The law is settled, that, if the drawee has accepted, *supra* protest, for want of advice of effects, and before the bill is payable he receives effects, he is bound to discharge the endorser, and advise him that he will pay the bill; 1 *Beawe's Lex Merc.* 109. Thus, if the Van Staphorsts had accepted, *supra* protest, for the honour of the defendants, and had afterwards received remittances from Delprat, they could not have paid the bill, *supra* protest, for the honour of the defendants; and by the acceptance, under guarantee, is intended to deprive the defendants of the benefit of those principles of law.

An acceptor for the honour of the drawer, must do it before he accepts generally, "or any ways engages or obliges himself thereto." *Marius Ex.* 30, 31. *Malyn Lex Merc. vol.* 1.

By parity of reasoning, a person under any obligation to pay, cannot pay a bill, *supra* protest, for the honour of another. 1 *Lord Ray.* 88.

The consequence of such proceedings might be, that, under a secret guarantee, the drawee might avoid the fulfilment of his obligation to pay the bill. Another objection is, that the endorser has imposed upon him a contract, without his knowledge or consent, and this the law will not permit, under circumstances exposing him to injury.

The party affected by this intervention, cannot have the same defence, or the means of the same defence, against a stranger, as against the drawee, as the guarantee may be, and is, generally, secret.

The evidence in this case shows, that the defendants did not desire to have the bill paid by any one but the drawees. Rougement & Behrends of London, were the agents of the defendants, and they write to the Van Staphorsts, that the holders of the

bill desire that it may be protested, if not paid. The plaintiff, therefore, knew that it was not the desire of the defendants to save the bill from dishonour. The plaintiff was the agent of the defendants to have the bill accepted, if not dishonoured. This is shown by the letter of 19th November 1822. He could not, therefore, interfere to pay the bill. It was against the nature of his agency.

Mr. Chief Justice MARSHALL delivered the opinion of the Court:—

This suit was brought in the Court of the United States, for the second Circuit and district of New-York, on a bill of exchange, drawn by John C. Delprat, of Baltimore, on Messrs. N. & J. & R. Van Staphorst, of Amsterdam, in favour of Le Roy, Bayard & Co. of New-York, and endorsed by them. The bill was regularly presented and protested, after which it was accepted and paid by the plaintiff, for the honour of the defendants. The jury found a verdict for the plaintiff, subject to the opinion of the Court, on a case stated by the parties. The Judges of the Circuit Court were divided in opinion, on the following points:

1. Whether the letters offered in evidence by the defendants, and objected to, ought to have been admitted.

2. Whether the plaintiff had a right, under the cicumstances, to accept and pay the bill in question, under protest, for the honour of the defendants; and is entitled to recover the amount, with charges and interest.

The first question is understood to be waived. It is a question which was decided by the Court, at the trial, and could not arise after verdict, unless a motion had been made for a new trial.

The second requires an examination of the case stated by counsel. The bill was transmitted by Le Roy, Bayard & Co. to Messrs. Rougemont & Behrings, of London, to have it presented for acceptance, who enclosed it to the plaintiff, in a letter, from which the following is an extract: "We beg you to have the enclosed accepted; 1st, of fl. 21,500, 60 days, on N. & J. & R. Van Staphorst, and hold the same to the disposal of 2d, 3d, and 4th. You will oblige me by mentioning the day of acceptance, and in case of refusal, you will have the bill protested."

The plaintiff gave immediate notice of the dishonour of the bill, and of their intervention, for the honour of the defendants.

Messrs. N. & J. & R. Van Staphorst addressed a letter to the defendants, dated the 26th of November, 1822, giving notice that the bill was dishonoured; the drawer having no right

to draw, and that they were advised by counsel not to interpose, in their own names, for the honour of the defendants. The letter adds, "In this predicament, we applied to our friends, William Konig & Co. who had the said bill in hand, informed them of the whole case, and requested these gentlemen, under our guarantee, to intervene on behalf of your signature, with acceptance and payment of the above bill; which favour these gentlemen have not refused to us; so that, without our prejudice, and completely without yours, we have duly protected your interest."

The defendants also gave in evidence, a letter from the plaintiff, stating that he had intervened, at the request of N. & J. & R. Van Staphorst, and under their guarantee; but that they required him to proceed against the defendants, as preliminary to the performance of that guarantee.

It was admitted that the bill was drawn by J. C. Delprat, on his own account, and not on any shipment for a debt due from him to the defendants, for advances previously made to him; and that he had given to the defendants an order on N. & J. & R. Van Staphorst, for all balances due from them to him.

It is not alleged that the drawees had any funds of the drawer in their hands.

The plaintiff in this case must be considered as the agent of N. & J. & R. Van Staphorst, and as having paid the bill at their instance. All parties concur in stating this fact. The Van Staphorsts adopted this circuitous course, instead of interposing directly in their own names, under the advice of counsel. They however immediately stated the transaction in its genuine colours, to the defendants. It is impossible to doubt, that a person may thus intervene, through an agent, if it be his will to do so. The suspicion which might be excited by proceeding, unnecessarily, in this circuitous manner, cannot affect a transaction, which was immediately communicated, with all its circumstances, to the persons in whose behalf the intervention had been made; unless those persons were exposed to some inconvenience, to which they would not have been exposed, had the interposition been direct. This is not the case in the present instance, since it cannot be doubted that the defendants might have availed themselves of every defence in this action, of which they could have availed themselves, had N. & J. & R. Van Staphorst been plaintiffs. The case shows plainly, that the bill was not drawn on funds, and that the drawees were not bound to accept or pay it. No reason, therefore, can be assigned, why the person who has made himself the holder of the bill, by accepting and paying it under protest, should not recover its amount from the drawer and endorsers.

(Konig vs. Bayard et al.)

This cause came on to be heard, on a certificate of division of opinion of the Judges of the Circuit Court of the United States, for the southern district of New-York, and on the points on which the said Judges were divided in opinion, and was argued by counsel, on consideration whereof, This Court is of opinion, that the plaintiff had a right, under the circumstances, to accept and pay the bill in question, under protest, for the honour of the defendants, and is entitled to recover the amount, with charges and interest; which is ordered to be certified to the said Circuit Court.

GERRIT SCHIMMELPENNICH, AND JAN ADRIAN TOE LEAR, WHO ARE ALIENS, *vs.* WILLIAM BAYARD, WILLIAM BAYARD, JUN. ROBERT BAYARD, AND JACOB LE ROY, CITIZENS OF THE STATE OF NEW-YORK.

In this case, the Court confirm the principle estatablished in the case of Coolidge *vs.* Payson, 2 *Wheat.* 75, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it; is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise. {283}

If the drawees of a bill of exchange, who refuse to honour the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act. They can acquire no right, as the holders of the bill paid *supra* protest, if they were bound to honour it, in the character of drawees. {285}

A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignees of the property, and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill, generally, to the account of the shipper; held that the drawees were not bound to accept or pay the bill, in consequence of the proceeds of the shipment being received by them. {286}

A merchant has a right, by the usage of trade, to draw on effects placed in the hands of the drawee, by shipment; and the consignee must pay the bills, if the shipment places funds in his hands. {288}

It is believed to be a general rule, that an agent, with limited powers, cannot bind his principal, when he transcends his power. It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet, if the principal has, by his declarations or conduct, authorized the opinion, that he had given more extensive powers to his agent, than were in fact given, he would not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. {290}

THIS action was instituted in the Circuit Court of the United States, for the Southern district of New-York, upon nine several bills of exchange, drawn at Baltimore, at sixty days sight, by John C. Delprat, on the plaintiffs, carrying on business under the firm of N. & J. & R. Van Staphorst, merchants in Amsterdam, and endorsed by the defendants.

The cause was tried in April, 1825, and a verdict taken for the plaintiffs, for $32,275 95, being for the whole amount of their claim; subject to the opinion of the Court, upon a case agreed.

The Judges of the Court below, having divided in opinion

on the following points, the same were certified to this Court, and the cause was argued upon the case agreed, and the points upon which there was a division of opinion, by the Judges of the Circuit Court.

1. Whether the authority of J. C. Delprat, to draw upon the plaintiffs, did or did not amount to an acceptance of the bills?

2. Whether the bills paid by the plaintiffs, *supra* protest, for the honour of the defendants, were drawn and negotiated, in conformity to the authority and instructions of the plaintiffs, to John C. Delprat?

3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra* protest, for the honour of the defendants, the plaintiffs are entitled to recover the amount of the defendants?

4. Whether J. C. Delprat was a competent witness?

5. Whether the letter, offered by the plaintiffs in evidence, and rejected, ought to have been admitted?

6. Whether the plaintiffs are entitled to a judgment, on the verdict of the jury?

All the facts, with the correspondence between the parties, which were considered by the Court as necessarily connected with a full development of the case, are stated in the opinion of the Court.

The cause was argued by Mr. Ogden and Mr. Oakley, for the plaintiffs, and by Mr. Webster, and Mr. Ogden Hoffman, for the defendants.

For the plaintiffs.

This action is upon bills of exchange, drawn by Delprat, and accepted, *supra* protest, and paid by the plaintiffs, as they allege, for the honour of the defendants, who were the endorsers on the bills. It is admitted that the plaintiffs, being drawees of the bills, could accept and pay in this form; but it is claimed, that the bills were drawn under the arrangement between them and Delprat, and they were bound to accept them; that arrangement being a promise so to do.

This is the same question, as if the defendants in this suit had brought an action against the plaintiffs, on those bills, as *accepted bills.*

Does the authority to draw, create a promise to accept? It is admitted that the law of France is, that acceptance shall be on the face of the bill. The law of France is the law of Holland. We deny that the contract between the plaintiffs is such a promise to accept, as that, even if all its provisions and conditions had been complied with, any third party could have taken advantage of it.

As it related to the parties themselves, it was a good promise, when Delprat conformed to the provisions of the arrangement; but strangers had no right to avail themselves of this. The promise in the contract was made to Delprat, and was not assignable in its very nature.

It is only when the promise points to some bill drawn, or to be drawn, with such minuteness and certainty as to sums, time, and parties, as that it may be considered a complete transaction, and a finished agreement, that the promise can avail to the use of third parties; and then it does not so avail as a promise to accept, but as an actual acceptance.

There is no case of a *parol* promise to accept, being considered as an acceptance; and the doctrine has been already carried too far, so as to become the subject of regret. But there is no case which goes as far, as the plaintiff claims in this.

Cases cited, 3 *Bur.* 1663. 1 *East*, 98. 4 *East*, 57. Wynne *vs.* Raikes, 5 *East*, 54. Cooledge *vs.* Payson, 2 *Wheat.* 66. *Starkey*, 411.

All those cases rest on the express promise to accept. Goodrich *vs.* Gordon, 15 *John.* 6. Why, if the authority to draw was a promise to accept, say, there was also a promise to accept?

The case of Cooledge *vs.* Payson, 12 *Wheat.* 66, before this Court, settled all the principles relative to an obligation to accept; and this case does not come within the rules of law there established. The principles decided by the Court in that case, were in the language of the Court:

"Upon a review of the case, this Court is of opinion, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

The decision of the Supreme Court of New-York, recognises the same principles. That case was—

Gordon was sending a sloop from New-York to Savannah, during war. Hogan wrote a letter of instructions, viz. "should he be captured, ransom the vessel, as low as possible, not to exceed 2,000 dollars, and your draft on me will be duly honoured." He was captured, and drew the bill, for ransom, within the sum, and gave the letter, with the bill.

Chief Justice Marshall says, "the testimony is full evidence that this letter, at all times, accompanied the bill—that the bill was drawn on the faith of it;—and that it was on the faith of this letter that the plaintiff, who was an endorser, took the bill from the first endorser—and it would be a gross want of faith, now, to disclaim the captain's authority.

The arrangements between the plaintiffs and Mr. Delprat,

were *personal to him*, and could have no effect upon the transactions of others. They were to operate on the general business to be carried on between them, and their main object was, consignments to the plaintiffs. Mr. Delprat might purchase parts of cargoes, and they were willing to "facilitate" all such commercial operations of his, as "they could without prejudice to themselves."

Under this arrangement, Mr. Delprat purchased and shipped goods, drew for them, and the proceeds of the shipments were carried to his account, and the bills paid, and charged to him. The defendants were not parties in those transactions, and they stood as mere purchasers of the bills in the market.

These transactions are similar to many others in the United States, and have never been considered as involving an obligation to accept the bills, of which a purchaser can take advantage. Such a responsibility, on the part of the drawees of a bill, would give to it a *greater effect*, when in the hands of an *assignee*, than it had before the transfer.

There is no *usage* making the authority to draw an acceptance. There is no case in which it has been ever so held; and it is inconsistent with the negotiable nature of bills.

The question, therefore, which has been raised, is met in its most imposing form, with an answer in the affirmative; when acting under such an arrangement as that between the plaintiffs and Mr. Delprat, could the plaintiffs take the goods shipped to them, and refuse to pay to a third person, the bills drawn upon those goods? It is considered they could; such is the mercantile law, and it cannot be otherwise.

Bills of exchange are purchased on the faith of the names upon them, and not under an expectation that there is a collateral obligation to pay them, on the part of the drawee. There is always an expectation, that the bills will be paid; but this expectation does not constitute a legal right against the drawee. In reference to the present bills, it appears from the testimony, that the defendants actually charged Mr. Delprat a commission for endorsing them, without which, they could not have been advantageously negotiated.

It is said, that the shipments were made *in trust to pay these bills*, and that the plaintiffs could not take the property free from the trust. Let this be so; but who can enforce the trust? Certainly not the assignees, as the trust is not assignable. To the drawer only, would the parties under such circumstances be answerable. The agreement made by the plaintiffs and Delprat, was never performed by him, in any case; and thus the danger is manifested, of giving to a stranger, rights which Delprat would not have had himself. No lien existed on the goods, by which the payment of the bills could have been en-

forced; no such lien has ever been supposed to exist; all liens require possession in the party or his agent. The goods in this case went to Holland; the bills were sent to England; where is the possession to maintain the lien?

If the bills had been drawn upon particular shipments, and the invoices and bills of lading of the goods had been delivered with the bills, the plaintiffs being so advised, by Delprat; then they must have opened a particular account with the party holding the bills, and have paid them out of the shipments.

As to the suggestion of an equitable lien on the goods, for the payment of those bills; it cannot be contended, that the holder of the bills could follow the goods and enforce it. The law of Russia, gives a party a right to follow goods until he is paid, but this is not the law here. The policy of the English law, and that of all commercial countries, is, that the paper is disconnected with the property.

It is well settled law, that where goods are carried, under a permission to draw, the bills of lading being remitted fixes the property in the consignee, against the creditors of the consignor, although they get the goods. 1 *Bos. & Pul.* 563. 3 *Chitty*, 550. If A sends goods to B, and directs him to pay the proceeds to C, this creates no lien in favour of C. 1 *Starkey*, 123. 143. 14 *East*, 558. *Chitty*, 550.

Mr. Delprat was not the agent of the plaintiffs, under the contract, to draw the bills. He stood in no other relation to them, than that of a corresponding merchant, with like powers. He did not draw the bills as agent; they were said to be on his own account, nor did he pretend to bind the plaintiffs, by his acts, as his principals. *Bayley on Bills*, 156. 64. 3 *Term Rep.* 757. *Chitty on Bills*, 31. Agency may be inferred from analogous acts, but they must be of that character. There is no proof that similar bills were ever paid by the plaintiffs.

The plaintiffs sent to the defendants their contract with Mr. Delprat, to show that they had granted him the credit. In their letter to the defendants, they do not say any thing about the authority to draw; in reference to the credit, they desired the defendants to supervise the transactions of Delprat; in reference to any bills he might draw, they would take care of themselves, by refusing to accept them.

There is an answer to all the allegations, as to lien, and to an alleged liability to accept. The bills, it is manifest, were not taken on the credit of the drawees.

Mr. Oakley, for the defendants.

The mercantile house of the plaintiffs, at Amsterdam, were desirous to extend their business in the United States; and they employed Mr. Delprat, giving him authority to draw upon them, according to particular directions, and with a credit of

40,000 dollars, with the defendants. He acted under this arrangement for four years, and then failed; and the question is, who shall sustain the loss arising in the course of his transactions, out of bills drawn by him, upon the plaintiffs. The business between Mr. Delprat and the plaintiffs, was not confined to the contract, nor were his acts in conformity to it; and yet the plaintiffs went on, without communicating to the defendants; who were deeply connected with them in mercantile business, and who had been particularly invited to an agency in their arrangements with Mr. Delprat; that their confidence in Mr. Delprat, their agent, had diminished, or they proposed to withdraw the agency from him.

They suddenly break off the relations between them and Mr. Delprat, and refuse to pay bills, drawn on property which had been shipped to them, and which were to provide for the payment of the bills; taking the funds, the proceeds of the goods, to the credit of their general balance, arising out of their several transactions; and they then pay the bills, *supra* protest, for the honour of the defendants, who were endorsers on the bills. Can this be done?—can they take the goods, and not pay the bills?

Had the plaintiffs a right to accept the bills *supra protest*, for the honour of the defendants?

He who gives an acceptance for the honour of a party, must do it before he accepts generally, "or any ways engages or obliges himself thereto." 1 *Lex. Merc. (Malyn) Marius advice concerning Bills of Exchange*, 30, 31. In 1 *Lord Raymond*, 88, Lord Holt says, "an acceptor for honour of drawer, is when a stranger, having no effects of drawer, accepts *out of respect to the drawer.*" The principle there, is that there can be no acceptance *supra protest*, for the honour of any party, when the acceptor is under any obligation, legal or equitable, as it respects that party to accept generally. This results from the nature of acceptance *supra protest.*

The rules of law are—

1. An acceptor *supra protest*, may demand a recompense, for the credit given him, for whose honour he accepts, *Beawes's Lex. Merc. f.* 44; and if he re-draws, his bill ought to be readily complied with, *besides a grateful acknowledgment of the favour.*

2. Where a bill is paid *supra protest*, the payee may re-draw, with addition of commission, and it ought, in *gratitude*, to be punctually complied with. *Ibid. pl.* 63, 64.

Such acceptance must therefore be *gratuitous*, with a just motive; and without connexion with, or reference to the interests of the acceptor.

To examine this case, according to these principles.—

1. As between the plaintiffs and the defendants, were those

bills such as should be considered as *accepted bills*; or bills which the plaintiffs were "in any ways obliged to accept?"

They were; because they were drawn by Mr. Delprat:—

1. In pursuance of his written authority.

2. If not in pursuance of a general authority, this authority was to be inferred from the general course of business. An authority to draw a bill, is virtually an acceptance of the bill, drawn in conformity to it. 9 *Mass.* 11. 2 *Wheat.* 72. 2 *Gallison*, 238.

2. A promise to accept a bill, is an acceptance, if the holder has taken the bill on the faith of the promise; although the bill is for a *pre-existent* debt, or whether the promise be before or after the bill is drawn. This is also the law, although the promise be obtained from the drawee fraudulently.

3. A general authority to draw bills, is equivalent to an acceptance of all bills drawn; or to a promise to accept all.

The facts in this case, were:—

By the agreement of January 11, 1818, between the plaintiffs and Mr. Delprat, he was their agent—1. To form commercial connexions. 2. To promote consignments. 3. To act as directed in the agreement. As the plaintiffs' agent, Mr. Delprat was bound—1. To act for no other persons in procuring consignments, either from himself or from others. 2. To use his utmost efforts, for the benefit of the plaintiffs.

The plaintiffs were bound—1. To facilitate Mr. Delprat's commercial operations, without prejudice to themselves.

The objects of this agreement were, to procure consignments, and that Mr. Delprat should act as the commercial agent of the plaintiffs, generally; and the means of accomplishing them, were to *draw bills*, to make advances on cargoes, and for which he was also to use the credit opened with the defendants. To the consignments, there was no limit; and of course, they could go beyond the credit.

From a view of all the letters between the parties, and the evidence, it is manifest, that Mr. Delprat acted as the general agent of the plaintiffs; to draw bills for advances on consignments, independent of the credit of 40,000 dollars, and after it was revoked. 2. That the plaintiffs paid such bills without regard to the balance of accounts with him, down to July 1822; and 3. That the plaintiffs never set up the objection, that the bills were drawn without authority, until October, 1822.

It is contended, that the agency of Mr. Delprat for the plaintiffs, appears—1. By the written agreement of the parties. 2. By the relative situation of himself and the plaintiffs, he being a commercial agent to procure consignments, by making advances by drafts on the plaintiffs. 3. In the course of the bu-

siness, and the long habit of the plaintiffs in paying the drafts drawn by him.

The authority of an agent may be shown—1. By his written power; or in the absence of that, by himself. 2. From the relative situation of the parties. 3. From the habits and course of dealing between the parties. 4. From the recognition of the acts of the agent, by the principal, or by similar acts. The evidence establishes the agency of Mr. Delprat, for the plaintiffs, upon all these principles. As to the bill for £1,000, of July 31, 1822—1. It was paid before it was due—It was drawn at 60 days; presented on the 14th September, and paid on the 1st October following. 2. There can be no payment *supra protest*, until a demand and refusal of payment regularly made. This refusal cannot be until the bill falls due. *Chitty on Bills*, 318.

Had the plaintiffs a right to pay those bills *supra protest?*

1. In case of acceptance *supra protest* for honour of the endorser, the bill must be presented for payment, and duly protested. *Chitty*, 313.

2. If the drawee has accepted *supra protest*, for want of funds or effects, and afterwards receives effects; he is bound to discharge the endorser, and to advise him that he will pay. *Beawes's Lex. Merc.* 109. Thus, there may be an obligation to pay, when there was none to accept. As to the bills of July 31, 1822, for £1,000, and 5,000 guilders, they were drawn on shipments by the Virginia. The plaintiffs were so addressed—the consignment of the property was received by the plaintiffs, after protest for non-acceptance, and before the bills were paid. They were, therefore, bound to pay those bills out of the proceeds of those shipments.

The plaintiffs cannot take this property, and apply it to their general account with Mr. Delprat, refusing to pay the bills drawn on advances on the very property. The shipments, when they were advised of the facts, were received by them, subject to an equitable lien, in favour of the holders of their bills; and they have a right to their application to the payment of the bills.

As to the bills paid before the arrival of the ships. 1. Payment, *supra* protest, is evidence of money paid to the use of the defendants. It is an equitable action, and admits of any equitable defence. Can it be sustained, after effects to pay the bills have come into the hands of the plaintiffs? Does not the receipt of the proceeds of the property, reimburse the plaintiffs in the payment?

Equity will frequently give a party relief, in effect amounting to a lien, though not in possession of the goods, to have his demand satisfied out of the proceeds of the goods, in prefer-

ence to any other party. *Chitty's Commercial and Maritime Law*, 550–1.

The defendants ask the application of this principle to the bills upon which this suit has been instituted.

Mr. Ogden, same side.

This action is to oblige the defendants to pay the amount of bills paid for their honour, and which they say should have been paid by the drawees. The plaintiffs received the property, against which the bills were drawn; and the question is, whether property could be received, and the bills drawn upon it be left unprotected? The consignee of property is nothing more than a trustee, to receive the property, and appropriate the proceeds to the use of the consignee, and he must conform to the directions of the consignor. In this case, the bills of exchange drawn by Mr. Delprat, were the direction as to the appropriation of those funds.

It is no answer to this, to say, that the consignor is a debtor to the consignee; and that upon the principle that a consignee can pay his general balance out of goods, which come into his hands, the plaintiffs would make use of the funds, for their own purposes. They could not get possession of the property, but by a wrongful act; as they had not a right to receive it on any other terms, but those prescribed by the shipper. Those bills, or the letters of advice, state, that they were drawn for advances on goods shipped.

1. May not the drawees of the bills be considered as assignees of this property, bound to appropriate the proceeds to the payment of the bills? This would be the case in equity.

In New-York, the point has been decided. If the consignee takes goods, he takes them subject to the lien on them.

The evidence shows, that Mr. Delprat was the agent of the plaintiffs, engaged in making shipments to them, against which he drew bills, similar to those in which this suit is brought; and that between January and July, 1822, he shipped goods to the plaintiff to a very large amount; upon which bills were drawn, and which were accepted by the plaintiffs, and were paid. Mr. Delprat was the general agent of the plaintiffs. *Payley on Agency*, 2. 1 *Washington's Rep.* 19. 11 *Mass. Rep.* 55.

It is said an authority to draw, is not an agreement to accept. What else is it, but an implied promise to accept? In Cooledge *vs.* Payson, 7 *Wheat.*, this Court has decided the point as to *a particular bill*—these are bills of *a particular class*. It is not necessary that the bill shall express to be drawn as agent, to bind the principal; the contrary practice is universal, and it was the practice not to draw the bills of those parties in that form. If it shall be said that Mr. Delprat had authority

to draw bills under particular agreement, and that those bills were not drawn in conformity with that agreement; the answer is, that the letter of the plaintiffs, announcing their refusal to accept the bills, does not state the refusal to have been on that ground.

It has been decided, that if underwriters refuse an abandonment, for reasons assigned, they cannot, afterwards, on the trial, allege other reasons for not paying the loss. The objections made by the plaintiffs to the bills, were, that accounts were not kept and settled by Mr. Delprat; and that a balance was due to them for their shipments; not because of mal-agency. The facts of the case show that those bills were drawn in conformity with instructions.

But, even if they had not, still the principals were bound. The law is so settled, even if the agent violates instructions. 2 *Kent's Commentaries*, 484. Another point in this case, which is in favour of the defendants, rests on the particular situation of the two houses of trade, formed by the parties to this cause. Whatever may be the law as between strangers, the attempt made by the plaintiffs to throw those bills on the defendants, is a violation of the good faith which had always existed between them.

Between them, the highest confidence existed. The defendants were agents for a large amount of the stocks of the United States, held by persons in Holland, and which were under the care of the plaintiffs; and they had large transactions for mutual benefit.

In 1818, Mr. Delprat was appointed, by the plaintiffs, their commercial agent, and was recommended to the particular care of the defendants, who were asked to "facilitate his operations." The agreement with Mr. Delprat was enclosed to the defendants, for the purpose of showing to them the nature of his agency, and informing them of his powers, and of the credit they had given to him. The defendants were to render such services, as would enable Mr. Delprat to execute the purposes of the contract. Thus were the defendants brought into a close connexion with Mr. Delprat, for the purpose of promoting the designs and interests of the plaintiffs; and those bills, believed by them to be drawn in the regular course of the transactions, authorized by the relations between Mr. Delprat and the plaintiffs; were endorsed to "facilitate the operations" of Mr. Delprat, supposed to be beneficial to all parties.

It is said that the plaintiffs were, by the contract entered into by them with Mr. Delprat, to have nothing to do with the drawing of bills. They did not so construe the agreement, nor did the plaintiffs so consider it. The construction of commercial agreements is best made by the understanding of the parties to them, and the

use made of the same. The evidence shows, that the construction which was assumed as proper, by the defendants, and upon which they acted, in endorsing those bills; had been frequently affirmed, in the course of former transactions, by the plaintiffs.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This action was brought on nine bills of exchange, drawn by John C. Delprat, on the plaintiffs, and endorsed by the defendants, a list of which follows:—

Baltimore,	May	23,	1822,	£500	favour of J. P. Kraft.
"	"	27	"	200	favour of defendants.
"	"	"	"	300	"
"	"	"	"	500	"
"	June	12	"	1,000	"
"	"	18	"	300	"
"	July	31	"	1,000	"
"	"	"	"	fr. 10,000	"
"	"	"	"	5,000	"

These bills were regularly protested for non-acceptance and non-payment; but were accepted and paid, *supra protest*, by the drawees, for the honour of the defendants the endorsers. The jury found a verdict for the plaintiffs, subject to the opinion of the Court, on a case stated. The Judges were divided in opinion, on the following points, which have been certified to this Court.—

1. Whether the authority to John C. Delprat to draw on the plaintiffs, did, or did not, amount to an acceptance of the bills.
2. Whether the bills paid by the plaintiffs, *supra protest*, for the honour of the defendants, were drawn and negotiated in conformity to the authority and instructions of the plaintiffs to J. C. Delprat.
3. Whether the plaintiffs were bound to accept and pay the bills in question, and whether the same having been paid by the plaintiffs, *supra protest*, for the honour of the defendants; the plaintiffs are entitled to recover the amount of the defendants.
4. Whether J. C. Delprat was a competent witness.
5. Whether the letter offered by the plaintiffs in evidence, and rejected, ought to have been admitted.
6. Whether the plaintiffs are entitled to a judgment on the verdict of the jury.

These questions require an examination of the relations which existed between the drawer of these bills, and the drawees.

On the 11th January 1818, the plaintiffs entered into a contract with John C. Delprat, of which the following is a copy:—

The undersigned N. and J. and R. Van Staphorst, merchants in this city, and John C. Delprat of Philadelphia, present the

last, choosing for the present act his *domicilium citandi et exequendi*, at the office of the youngest notary here, have entered with one another into the following arrangement and stipulations:—

ARTICLE I. The second undersigned (viz. J. C. Delprat) shall, to the benefit of the first undersigned (N. and J. and R. V. S.) manage in the United States of America, the mercantile interest of said first undersigned, consisting chiefly in the forming of new solid connexions, and procuring of consignments; and shall further perform every thing the first undersigned will appoint him to do as their agent.

ART. II. The second undersigned, binds himself to procure to no person or persons in this kingdom, any consignments or commissions from himself or any other, except to the first undersigned; but on the contrary, to use his utmost exertions towards the benefit of the mercantile house of the first undersigned, they being willing on their side to facilitate all such commercial operations as might benefit the second undersigned, without their prejudice.

ART. III. The first undersigned allows to the second undersigned the *faculty to value* on them direct, or payable in London, at no shorter date than sixty days sight, *for such moneys* as the second undersigned shall employ to *make advances* on whole or part of cargoes of current articles, viz. to the amount of two thirds of the invoice price of articles laden in chartered vessels, and of three-fourths in vessels owning to the shippers, and likewise *consigned* to the first undersigned; it being left to the knowledge and prudence of the second undersigned to judge of the invoice price of the aforementioned goods; and it *being understood* that the second undersigned, at the same time that he gives advice of his drafts furnished in the above manner, shall enclose and forward, or cause to be enclosed and forwarded, to the first undersigned, the bill of lading and invoice of the goods on which the above mentioned advances might have been made; and shall cause the above goods to be duly insured in America, to that effect, that the policy of said insurance be delivered up, duly endorsed, to the second undersigned, *and rests with him until the end of the expedition.* It being further a fixed rule, that the first undersigned must never come in the predicament of having made any advances on cargoes or part of cargoes, which are not duly insured in America.

The first undersigned *further* oblige themselves to open a credit of $40,000, say forty thousand dollars, with Messrs. Le Roy, Bayard & Co. New-York, *to be made use of by the second undersigned, in case any advances are required on consignments to be made to the said first undersigned, that credit to be renewed*

every time by the said first undersigned, after the arrivement of the consigned goods shall have been duly advised by them.

If, however, against all probability, it happened that the multiplicity of consignments rendered it desirable to the first undersigned, to stop for a while further consignments, then the said first undersigned retain the FACULTY to prescribe to the second undersigned such *limits and orders* as they shall find proper according to circumstances, which orders and limits the second undersigned shall be obliged to follow.

ART. IV. As sometimes an opportunity might offer to procure a good *consignment* to the first undersigned, on condition of their taking an interest in that expedition, they authorize the second undersigned *to make use likewise of the above mentioned credit of* $40,000, *to interest the first undersigned;* in such expeditions for a proportion not larger than *one-fourth*, with this restriction, that said proportion must never exceed the amount of $10,000, say ten thousand dollars. The choice of the articles to be shipped to the first undersigned on their own account, being left to the commercial knowledge of the second undersigned. This authorization will be considered as renewed after the termination of each expedition, viz. after that termination shall have been duly advised to the second undersigned by the first undersigned.

ART. V. That the first undersigned, in consideration of the services to be rendered by the second undersigned, shall grant to the second undersigned, one-third of the amount of the two per cent. commission, to be earned by the first undersigned on the consignments to be procured, and further one per cent. from the purchase of such goods which might be shipped for the account of the first undersigned, as is more amply specified in article 4; it is to be understood, that then no benefit arises from the third of the two per cent. commission of those goods; and finally, that the second undersigned is promised an allowance for travelling, and other expenses, the sum of $2,000, say two thousand dollars, per annum, to commence with the first of February 1818.

ART. VI. These arrangements shall last for the term of two consecutive years, and thus end with the last day of January 1820. It being understood that (in case of no denunciation to the contrary, made by any of the parties aforesaid) this contract will be continued from year to year, but that in case one of the parties should desire the annullation of the present contract, said party shall be obliged to signify his intention to the other party, four months before the expiration thereof.

ART. VII. Ultimately it has been stipulated, that in the unhoped for and wholly unexpected case of any differences taking place between the undersigned, respecting the fulfilment of any

of the articles above mentioned, those disputes or differences shall be entirely adjusted and decided by the decision of two arbiters, to be chosen in the city of Amsterdam, one by each party, who in case of difference of opinion between them, shall have the FACULTY of appointing a third or super arbiter, which arbiters then must decide and finally terminate all such differences; *both parties renunciating to all law measure and impediments*, and especially to the *faculty of laying any arrests, or hindrance, on moneys, goods, or possessions*, belonging to any one of the parties undersigned, *all such aforesaid measures* to be considered now and then as *null, void, and of no effect whatsoever*, the consequences thereof to be suffered by the party which might have made use of the aforesaid measures.

Of the present act have been made two copies, &c.

Amsterdam, 11th January 1818.

(Signed) N. & J. & R. VAN STAPHORST.
JOHN C. DELPRAT.

A copy of this contract was transmitted by the plaintiffs to the defendants, in a letter dated the 21st of the same month, a copy of which follows:—

Messrs. LE ROY, BAYARD & Co. N. York, (confidential.)

Amsterdam, 21st Jan. 1818.

Gentlemen—Thinking it useful for the extension of our commercial relations in the line of consignments, (one of the branches of our establishment,) to appoint an agent to that purpose in the United States of America, we have been decided by the confidence we place in the character and commercial notions of Mr. John C. Delprat, to appoint that gentleman to the aforementioned trusts, in which choice we have chiefly been directed by the reliance we have on the principles of loyalty and prudence, which must actuate a person employed during such a long period by your worthy house. We judged it necessary for the obtaining of said purpose, to leave at the disposal of Mr. Delprat, *sufficient means to facilitate his exertions*, viz. by opening with you in his favour, a credit to be made use of by him, in the manner pointed out in the *enclosed abstract* of our contract with said gentleman. We therefore request and authorize you to furnish Mr. Delprat to the extent of $40,000, *say forty thousand dollars, (to be made advances with by him on such cargoes or part thereof, as he might procure the consignment of to our house, and to be made use of to interest our house in part of cargoes to the forementioned purpose.)* The credit to run for the space of two years, unless countermanded by us, in such a manner that when Mr. Delprat *has availed himself of the whole or part of said credit of* $40,000, that credit or part of the same must be considered renewed when you receive our approbation of the said disposition of Mr. Delprat.

You will observe the sole object of the mission of Mr. Delprat, is to obtain solid consignments from good houses throughout the U. S., and the disposal of the credit opened in his behalf with your house, *is exclusively intended to facilitate said business.* In this important matter, it will be a point of great security, and as such, eminently satisfactory to us, that our said agent may be able to have recourse in every circumstance, to wise and *friendly counsel*, and we therefore request you to assist Mr. Delprat, as far as opportunity may offer, with the lessons of your long experience, *particularly with respect to those transactions for which, by virtue of the credit aforementioned, we may have recourse to your cash, it being, as you will observe, a material point that we are secured, that the moneys he may dispose of will have no other than the destination just mentioned.* To this effect, we authorize you, gentlemen, *in case of moral certainty, that the moneys Mr. Delprat should demand from you* by virtue of the abovementioned credit, would not be employed in the aforementioned manner, and earnestly request you *not to pay* and to refuse him any moneys whatsoever, on account of the above credit.

In general, as a trust of this nature, which is to have its effect at such a distance, is always a delicate matter, we must claim and dare expect from your known sentiments towards us, that you will give the strictest attention to the line of conduct followed by Mr. Delprat; and if, unexpectedly, that conduct could appear in the least exceptionable, we mean either imprudent or equivocal, then, gentlemen, do give us, with all the frankness of long experienced friendship, your ideas respecting that subject, and be perfectly secure that every information, of what nature soever, will not only be thankfully acknowledged by us, but received with the most religious secrecy. We have now, gentlemen, only to request your kind offices in favour of Mr. Delprat, *and to solicit your friendly co-operation towards the attaining the object of his mission*, which we are fully persuaded can be much facilitated by your kind recommendation to the numerous friends you have in different parts of your country. Be assured, gentlemen, of the high sense we have of the obligation we will have to you, for your friendly services through the whole of the business we just now took the liberty to explain to you, and of the earnest desire we have to be often in the opportunity of rendering you the like, or any services in our power. Referring for commercial information to our general letter of this date, we are, with sincere regard,

Gentlemen, your most obedient servants,

N. & J. & R. Van Staphorst.

(Endorsed,) Confidential. Amsterdam, 21st of January, 1818. N. and J. and R. Van Staphorst. Received, March 29th. Answered, 24th do.

This letter was answered by Le Roy, Bayard & Co. in the following terms:—

PRIVATE.

New-York, 24th of March 1818.

Messrs. N. & J. & R. VAN STAPHORST, Amsterdam.

Gentlemen—We have the honour of replying to your esteemed favour of 21st of January, acquainting us with the arrangement you have made with our mutual friend, Mr. Delprat, who has undertaken the agency of procuring you consignments from this country. In the furtherance of the object, we shall be very happy to render our services useful, and beg to offer our best wishes for the success of Mr. Delprat's operations in your behalf. *Due note* is taken of the credit you are pleased to open to that gentleman with us, to the amount of 40,000 dollars, subject to renewal, as fully expressed in *your letter*. We doubt not from the knowledge we possess of Mr. Delprat's character, that he will fully justify the confidence you repose in him; and though he may, under existing circumstances, find it difficult to enlarge to the extent that could be mutually wished, we are persuaded that no exertion will be wanted on Mr. Delprat's part, to reap the utmost benefit from the mission intrusted to him.

Believe us, with honour and esteem, gentlemen,

Your obedient servants,

LE ROY, BAYARD & Co.

It is proper to observe, that several merchants of Holland, whose agents the plaintiffs were, had become large holders of government stock, and of shares in the Bank of the United States. Le Roy, Bayard & Co. had been employed to draw the interest and dividends, and to remit them to Europe. The credit of 40,000 dollars, therefore, which was raised for Delprat, with Le Roy, Bayard & Co., was merely the application of so much of their funds, in the United States, to the business of his agency, in aid of the bills he was authorized to draw on them. The continuance or discontinuance of this credit, might depend on the eligibility of continuing this mode of remittance, as well as on the withdrawal of their confidence in their agent. Several letters passed between the plaintiffs and defendants, respecting their transactions in consequence of this credit; which manifest, unequivocally, the desire of the plaintiffs that its amount should not be exceeded, but which betray no want of confidence in Delprat. In a letter of the 24th June, 1819, they renew the credit of 40,000 dollars; and add, "at the same time, we confirm our former orders not to exceed said amount, for our account. In case you have funds in hand, for any of our institutions, and you think proper to remit us for the same, Mr. Delprat's bills on us; the nature of which you are well acquainted with; you allow him then, the same credit,

which you do to all persons from whom you take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued.

In answer to this letter, the defendants say, on the 24th of September, 1819: "You also accord us the permission to remit this gentleman's, (Delprat's) drafts, for any moneys we may have on hand belonging to your various institutions. The confidence which we mutually have in this gentleman's character, must, with us, act in lieu of vouchers, to exhibit the reality of transactions, which may give origin to such drafts; the whole of this gentleman's operations having been hitherto beyond our immediate knowledge."

This correspondence continued until the 12th of May, 1820, when N. & J. & R. Van Staphorst addressed a letter to Messrs. Le Roy, Bayard & Co. of which the following is an extract:

"There being frequent opportunities of drawing here, now, on New-York, we will probably have, for some time to come, occasion to dispose of the dividends which "you will receive for our account, in October next," and so on; and we have therefore directed Mr. Delprat not to make use of his credit of $40,000, lately opened in his favour. We thus also request you, by the present, to consider the same as annulled, until we may again renew the same."

The agency of Delprat continued after this revocation of his credit with Le Roy, Bayard & Co. He continued to solicit consignments for their house in Amsterdam, and to draw bills on them for advances, without any other alteration in his powers, than is contained in a letter of the 6th Feb. 1821, which contains the following clause. "The advances, therefore, to be made by you on our behalf, on shipments to our consignments, either from funds belonging to us, in your hands, or by drawing and endorsing the shipper's draft, must not exceed, henceforth, one half of the "true invoice." As a compensation for this reduction of the advance to be made in the United States, J. & N. & R. Van Staphorst, engaged, on the arrival of the shipments, to remit to the consignors, the estimated value of the cargoes, in bills on their house in the United States.

Delprat acknowledged the receipt of this letter on the 17th of April, 1821, and promised to conform to its directions.

The correspondence between the plaintiffs and defendants, respecting Mr. Delprat's agency, appears to have ceased on the 12th of May, 1820, when his credit with the house of the latter was annulled. At least, no subsequent letter appears in the record, until the 9th of July, 1822, when the plaintiffs announced to the defendants the sudden termination of their connexion with Mr. Delprat; whose conduct, they said, has been so imprudent as to oblige them, at the same time, to protest se-

veral of his drafts. Their knowledge, they say, of the former intercourse between Le Roy, Bayard & Co. and Mr. Delprat. and of the great regard felt for him by those gentlemen, induce them to state the chief reasons which compelled them to this measure. These are, his irregularities in keeping his accounts, and omission to furnish an account since the 31st of December, 1820, although the balance then due from him was fully $7837 54, being "for the proceeds of gin consigned by us to him; for proceeds of drafts, issued by him on us, for our account, in order to employ the proceeds to make prudent advances with," &c.

They then proceed to state, that Mr. Delprat owed, at that date, upwards of 82,000 florins, against which he might be entitled to a credit of $6000. The account, they say, has accrued to this height, in a great measure, "in consequence of shipments made to him for his account, in full confidence of his making us, for the amount, remittances; which we till now have not received; though the goods were with him, for many months." The letter complains of the large advances made by Mr. Delprat, on consignments, notwithstanding their repeated remonstrances; and dwells on the high opinion they had entertained of him; "his integrity," they say, they "even now will not question." Thus, the letter proceeds, "were matters situated, when last Friday, contrary to any thing we could expect or anticipate, we found ourselves drawn upon by Mr. Delprat, for £200, £300, and £500; issued, as he informs us, for the amount of purchases which he is making of articles not yet shipped;" and on the other hand, 2d, £500, fl. 1250, and 1750, issued on us, as advances made to Mr. Krafft, already so much our debtor, on shipments which he made some long time ago, and which Mr. Delprat could clearly perceive, that taken at an average, did nothing diminish the balance due by him."

The letter proceeds to state, in substance, that they could choose only between the alternatives, of allowing the debt due from Mr. Delprat to be swelled to a still larger amount; and protesting his bills. They had chosen the latter, however it might pain their feelings. They express their regret to find, that among the drafts to be protested for non-acceptance, and perhaps afterwards for non-payment, are several endorsed by the defendants, for whose honour, however, they had intervened.

This letter was received by the defendants on the 1st day of September, 1822. They immediately obtained from Mr. Delprat an order on the plaintiffs, to hold at their disposal all the proceeds of the goods shipped in his name, by the Virgin, and other vessels, and all balances due to him. This order was enclosed to the

plaintiffs in a letter of the 7th September, 1822, in which they say, "We can of course only consider this order as applying to the balance that may possibly accrue to him upon the settlement of your account; and if any should accrue, we will thank you to take such legal steps, which you may deem necessary, as will place it with us, without fear of contention. His drafts, which you may have paid for our account, will probably furnish sufficient authority to enable you to do so."

At the trial, John C. Delprat was examined as a witness. He deposes, that the several bills of exchange, on which this suit was instituted, were drawn in his capacity as agent, on account of, and for the purpose of making advances on shipments consigned to the plaintiffs; and, except that in favour of J. P. Krafft, for £500, were accompanied by letters of advice. That during the whole period of his agency, he was in the habit of making shipments on his own account, and of drawing for advances on the said shipments, precisely in the same manner as when they were made by others; that this was done with the full knowledge and approbation of the said N. & J. & R. Van Staphorst, who never found fault with him for doing so; but to encourage him to make such shipments, gave him credit for one half the commission, upon the sales of the shipments, so made upon his own account. On his cross-examination, the witness stated that the bill for £500 in favour of Krafft, was drawn for shipments, by the Edward, Jason, and May Flower. He cannot say when the Edward sailed. The Jason had arrived, and the May Flower had sailed before the bill was drawn. Krafft was at that time indebted to the plaintiffs. The bill was issued to Krafft, but was returned to witness, who sent it to the defendants. The bills of lading, and the invoices, were not sent with it. The three bills of the 27th of May, for £1,000, were drawn on account of shipments, in his own name, by the Virgin. She sailed about the 30th July. They were not accompanied by invoices or bills of lading. The two bills of the 12th and 18th June, for £1,000, and for £300, were drawn on tobacco, shipped by the Henry, belonging to the witness and to Mr. Krafft. The bill of lading and invoice did not accompany them. The three bills of the 31st of July, were drawn on the shipments by the Virgin, generally. They were not accompanied by bills of lading or invoices. The defendants received a commission for endorsing his bills on the plaintiffs.

In making the advances on shipments on his own account, he drew on the plaintiffs, sent his bills to the defendants, to whom they were charged; and then drew on the defendants, as the money was required, either on his own shipments or the shipments of others; which bills were credited to the defend-

(Schimmelpennich et al. *vs.* Bayard et al.)

ants. He understands that all his transactions with the defendants, were carried, by them, into their general account with him. These transactions were not confined to his agency for the plaintiffs. He remains considerably indebted to them.

He was concerned in shipments with Mr. Krafft, and did a great deal of business with him; but did not consider himself as a general partner.

The connexion between the plaintiffs and J. C. Delprat, was formed by the agreement of the 11th January 1818. He was constituted their agent for purposes therein described; and received such powers as were deemed sufficient to enable him to perform the duties which devolved on him. That duty was to manage their mercantile interest in the United States, "consisting chiefly in the forming of new solid connexions, and procuring of consignments." To enable him to perform this duty, he was allowed the faculty to value on them direct, or payable in London, at no shorter date than sixty days sight, for such moneys as he should "employ, to make advances on the whole or part of cargoes of current articles;" viz. to the amount of two-thirds of the invoice price, &c. It being understood, that his letters of advice should be accompanied by the bills of lading and invoices of the goods, on which the advances may have been made.

John C. Delprat, then, had no general authority to personate the plaintiffs in all respects whatever; but was an agent appointed for particular porposes, with limited powers, calculated to subserve those purposes. To procure consignments, it was indispensable that he should advance money to the consignors, and this money was to be raised by bills on the plaintiffs. But he was authorized to draw only for a special purpose, and to a limited extent. Out of the limits assigned to him, he had no power. The plaintiffs not being, as a matter of course, the acceptors of every bill he might draw; must have performed some act in relation to the particular bills, which imposes on them, in law, the character of acceptors.

This point was considered by this Court, in the case of Cooledge and others *vs.* Payson and others.

Cooledge & Co. held the proceeds of a cargo claimed by Cornthwaite and Cary, whose claim depended on the decision of this Court, of a case depending therein. Cornthwaite and Cary were desirous of drawing these funds out of the hands of Cooledge & Co. and offered a bond, with sureties, as an indemnity, in the event of an unfavourable decision. Cooledge & Co. in a letter to Cornthwaite and Cary, state some formal objections to the bond, and add, "we shall write to our friend Williams, by this mail, and will state to him our ideas respecting the bond, which he will probably determine. If Mr. Williams

feels satisfied on this point, he will inform you; and in that case, your draft for 2,000 dollars will be honoured."

In answer to the letter addressed by Cooledge & Co. to Williams, on this subject, he declared his satisfaction with the bond, as to form; declared his confidence, that the last signer was able to meet the whole amount, himself; but that he could not speak certainly of the principals, not being well acquainted with their resources. He added, "under all circumstances, I should not feel inclined to withhold from them, any portion of the funds for which the bond was given."

On the same day, Cornthwaite and Cary called on Williams, who stated the substance of the letter he had written, and read a part of it. One of the firm of Payson & Co. also called on him, and received the same information. Two days afterwards, Cornthwaite and Cary drew on Cooledge & Co., for 2,000 dollars, and paid the bill to Payson & Co. who presented it to Cooledge & Co., by whom it was protested. Payson & Co. sued them as acceptors.

The Court instructed the jury, that if they were satisfied that Williams, on the application of the plaintiffs, made after seeing the letter from Cooledge & Co. to Cornthwaite and Cary, did declare, that he was satisfied with the bond referred to in that letter; and that the plaintiffs, on the faith and credit of the said declaration, and also of the letter to Cornthwaite and Cary, did receive and take the bill in the declaration; they were entitled to recover in the action.

The jury found a verdict for the plaintiffs; the judgment on which was affirmed in this Court.

In this case, the drawee had written a letter to the drawer, promising to honour his bill for 2,000 dollars; if Mr. Williams should be satisfied with a bond of indemnity, which had been placed in their possession. Mr. Williams declared his satisfaction with it, both to the drawer and holder of the bill, within two days after this declaration. In this case, the promise to accept was express, and applied to a particular bill, the precise amount of which, was specified in the promise.

The Court, in its opinion, reviews several decisions in England, on this point; in all of which, the promise to accept was express; and in some of which, the Court declared the opinion, that the promise ought to be accompanied by circumstances, which may induce a third person to take the bill. After reviewing these cases, this Court laid down the rule, "that a letter written within a reasonable time before or after the date of the bill of exchange, describing it in terms not to be mistaken, and promising to accept it, is, if shown to the person, who afterwards takes the bill on the credit of the letter, a virtual acceptance, binding the person who makes the promise."

It cannot be alleged that these bills are brought within this rule. The plaintiffs, therefore, cannot be considered as acceptors of them.

But, although the plaintiffs cannot be viewed as the acceptors of these bills, it does not follow, necessarily, that they can maintain the present action. To entitle them to maintain it, the Court must be satisfied that the payment is, in fact, what it professes to be, a payment really for the honour of the endorsees. If the drawees, thus refusing to honour the bill, and thus denying the authority of the drawer, to draw upon them, were bound in good faith to accept or pay as drawees; they will not be permitted to change the relation in which they stand to the parties on the bills, by a wrongful act. They can acquire no rights as the holders of bills, paid, *supra protest*; if they were bound to honour them in their character of drawees. The single and unmixed inquiry, therefore, on the second and third questions, is, whether the drawees were bound to accept or to pay these bills. And first, were they so bound, because the bills were drawn in pursuance of the authority they had given to the drawer? This demands a more critical examination of the evidence, than was required when considering the first question.

It is apparent, from the contract of the 11th of January 1818, that Mr. Delprat came to the United States, as the agent of N. & J. & R. Van Staphorst, to manage their mercantile interest; "consisting chiefly in forming new solid connexions, and procuring of consignments;" and also with commercial views of his own. The principal object of the contract is to define his authority, and to regulate his conduct as agent. He is allowed to draw on the plaintiffs, for such moneys as he should employ in making advances on current articles, consigned to his principals, to the amount of two-thirds of the invoice price of articles laden in chartered vessels. He was still further restricted, in his advances, by orders received long before the bills in question were drawn, to one half of the true invoice. Mr. Delprat's authority, then, to make advances, was limited at the date of this transaction, to one half the invoice price. One, and perhaps the most usual mode of conducting business of this description, is to draw in favour of the consignor, or to endorse his bill. The agent might, however, if not otherwise instructed, draw immediately on his principal, and advance the money to the consignor, which was raised by the bill. In either case, however, drafts beyond one half the invoice price of the consignments actually made, would exceed the authority given. Circumstances may exist, which would impose on the principal the obligation to pay such drafts; but the question we are now considering, relates only to the authority under which the bills were drawn. That authority re-

stricted the agent in the amount of his drafts, to one half the invoice price of the articles actually consigned; and also required him to accompany his letters of advice, with bills of lading and invoices.

Were the bills in question drawn in conformity with powers and instructions thus limited?

The first bill on the list is for 500 pounds, drawn in favour of J. P. Krafft, on the 23d of May 1822, and endorsed by him to the defendants. The letter of advice, states this bill to be drawn on account of shipments by the Edward, Jason, and May Flower, as by letter of 21st, which is to be charged to account of P. Krafft. The letter of the 21st is not in the record.

The shipment by the Jason had arrived, and the May Flower had sailed, before the bill was drawn. Mr. Krafft was at the time indebted to N. & J. & R. Van Staphorst. The bill was returned by Krafft to Delprat, and then endorsed by the defendants.

It does not appear, certainly, who remitted this bill; although the probability is, that, as it was endorsed by the defendants, not as purchasers, but for a commission; it was remitted by Delprat, to whom it was returned by Krafft, as is stated in Delprat's testimony, or by some person to whom Delprat sold it. It is true, that he further states, that, after the bill was so returned, he sent it to the defendants; but this was, no doubt, done for the purpose of having it endorsed by the defendants, in order to give it credit. Neither does it appear, from the evidence in the cause, that Krafft accompanied the shipments on account of which this bill was drawn, by any letter of advice, or otherwise, directing the proceeds thereof to be applied to the discharge of this bill; but, on the contrary, the letter of advice addressed to the plaintiffs, by Delprat, directed the bill to be charged to the account of Krafft, generally. Under these circumstances; taken in connexion with the additional one, that Delprat was concerned, generally, with Krafft, in the shipments made to the plaintiffs, the Court is of opinion, that there is no material difference between this bill, and those drawn on account of shipments made by, and in the name of Delprat, which are now to be considered.

It has already been stated, that Mr. Delprat was a merchant, trading on his own account, at the same time that he was the agent of N. & J. & R. Van Staphorst. His transactions, in his two characters, were as distinct from each other, as if they had been the transactions of distinct persons. As an agent, he was bound to act "in conformity to the authority and instructions" of his principals. As a merchant, he was himself the principal, and acted in conformity with his own judgment. It would seem, then, that the contract must contain some very peculiar

and unusual provisions, to place Mr. Delprat under the authority of the house in Amsterdam, whilst carrying on trade in the United States on his own account. Upon reference to the contract, we find a stipulation between the parties, in the following words:—"The second undersigned, (Delprat,) binds himself to procure to no person, or persons, in this kingdom, any consignments, or commissions, from himself or any other, except to the first undersigned; but, on the contrary, to use his utmost exertions toward the benefit of the mercantile house of the first undersigned; they being willing, on their side, to facilitate all such commercial operations, as might benefit the second undersigned, without their prejudice."

This article contains the only limitation on the entire independence of Mr. Delprat, as a merchant. It is, perhaps, a necessary limitation; which was, in part, the price of his agency, and for which he finds a compensation in the profits of the business confided to him. This restriction does not change the character of his transactions as a merchant. His waiving the right to consign to any other house, does not impress on his consignments to the Van Staphorsts, or on his bills drawn on those consignments, a character different from that which would have belonged to them, had his shipments been made from choice. He does not bind himself to make consignments to them; but not to make consignments to any other house in the Netherlands.

If any doubt could arise from this article, it would be produced by the peculiar manner in which it is expressed. Mr. Delprat binds himself to *procure* to no person in the kingdom of the Netherlands, any consignments or commissions, from *himself* or any other, except to the Van Staphorsts. The singular application of the word *procure*, to consignments made by Mr. Delprat himself; may be connected with the succeeding article, which authorizes him to draw bills, and may have some influence on its construction. In that article, the Van Staphorts allow Mr. Delprat "the faculty to value on them direct, or payable in London," for such moneys as he shall employ to *make advances* on the whole, or part of cargoes, of current articles consigned to them, to the amount of two-thirds of the invoice price.

It may be said, that, as in the preceding article, consignments made by Delprat, on his own account, were considered as *procured* by him, and were placed on the same footing with consignments made by others; so in this, the express authority to draw bills, might embrace transactions of both descriptions. But we do not think that the inaccurate use of words in one article, will justify a departure from the correct construction of a succeeding article; unless the same words are used, or the

bearing of the one on the other is such as to require that departure.

The same motives existed for restraining the agent from making, as from procuring consignments to any other house in the Netherlands. His utmost exertions were required for the benefit of his principals. The restriction, therefore, might be expressed in the same sentence; and a slight inaccuracy of language was the less to be regarded, because it could produce no possible misunderstanding with respect to the extent of the prohibition.

The third article might not be intended to prescribe the same rules for the conduct of Mr. Delprat, as a merchant, and as the agent of the Van Staphorsts. As a merchant, he had a right to draw on effects placed in their hands, independent of contract. The usage of trade allows such drafts to be made on a shipment; and the consigned must pay the bills, if the shipment places funds in his hands to pay them. But as agent, his line of conduct was to be prescribed by contract. We must, therefore, consult the language of the agreement, in order to determine whether it provides for the future connexion between the parties, farther than as regards their characters as principal and agent.

The faculty given to Mr. Delprat, by the third article, to value on the Van Staphorsts, is, "for such moneys as he should employ to *make advances*" on articles consigned to them. Money laid out in the purchase of articles on his own account, cannot, with any propriety of language, be denominated money employed in *making advances* on articles consigned to him. The distinction between money *advanced* on articles consigned, and money employed in purchases; although the articles may be purchased for the purpose of being consigned; is obvious. Money *advanced*, is always to another, never to the individual making the advance. This language shows, we think, incontestably, that the article was drawn with a sole view to bills drawn by Mr. Delprat, as agent; not on his own account as a merchant.

A subsequent part of the article gives additional support to this construction. Mr. Delprat is to draw for two-thirds of the invoice price of the article, and is himself the judge of the price which may be inserted in the invoice. This power might be safely confided to him, in making advances to others; but might not be trusted to him in his own case. The case shows the Van Staphorsts to have been men of extreme caution. Their letter to Le Roy, Bayard & Co., enclosing their contract with Delprat, shows an unwillingness to commit themselves to him further than was necessary. It is not probable, that they

would have given him an express authority to draw on his own account, on invoices to be priced by himself.

But the language of the article applies, we think, entirely to his bills drawn as agent, not to those drawn as a merchant transacting business for himself.

When examined as a witness, Mr. Delprat says, that during the whole period of his agency, he was in the habit of making shipments on his own account, to the said house in Amsterdam, and of drawing for advances on account of the said shipments so made, precisely in the same manner as when the shipments were made by others; and this was done with the full knowledge of N. & J. & R. Van Staphorst, who never found fault with him for doing so; but, in order to encourage him to make such shipments, gave him credit for one-half the commission upon the sales of the shipments, so made on his own account.

The Van Staphorsts were commission merchants, desirous of extending their business. No doubt can be entertained of their willingness to receive consignments from Mr. Delprat, as well as from others. But this does not prove, that the power given him as their agent, to make advances to others, was intended to regulate the intercourse between them as merchants. That intercourse was regulated by the general principles of mercantile law; and the contract between the parties, does not show that either was dissatisfied with those principles, or wished to vary them.

This question refers, we presume, to the authority given by the contract of the 11th of January 1818. The first article describes the objects which were committed to Mr. Delprat, by the Van Staphorsts. These were the management "of their mercantile interest in the United States, consisting chiefly in the forming new solid connexions, and procuring of consignments."

The second article restrains the right Mr. Delprat might otherwise have exercised, of consigning to other houses in the Netherlands.

The third authorizes him to draw bills on his principals, for the purposes of his agency, under such limitations as they deemed it prudent to prescribe.

This contract, we think, does not contemplate bills drawn by Mr. Delprat on his own account, as a merchant. The bills mentioned in the declaration, which were drawn in favour of the defendants, and endorsed by them, do not come within the authority given by the contract. No instructions from the plaintiffs, extending this authority, appear in the record.

The third question comprehends the whole matter in controversy, and has been partly answered, in answering the preceding questions. It asks, whether the plaintiffs were bound

to accept and pay the bills in question; and whether the same having been paid by the plaintiffs, *supra* protest, for the honour of the defendants, the plaintiffs are entitled to recover the amount of the defendants?

The opinion has been already expressed, that the bill drawn on the 23d of May 1822, for 500 pounds sterling, in favour of J. P. Krafft, is not distinguishable from those which were drawn by Mr. Delprat, to enable him to purchase articles on his own account, which were shipped to the plaintiffs. In making these shipments, and in drawing these bills, Mr. Delprat acted for himself, as an independent merchant. The relation between him and the plaintiffs, was that of consignor and consignee. The obligation of the plaintiffs to accept and pay his bills, depended essentially on the state of their accounts. So far as the information furnished by the case goes, Delprat appears to have been indebted to the plaintiffs. In their letters of 19th July and 10th September 1822, which were given in evidence by the defendants, they state him to be then their debtor; and it is not shown, that this debt has been discharged. The plaintiffs, therefore, were not bound to accept and pay these drafts, unless they have acted in such a manner as to give the holders of the bills a right to count on their being paid.

It is believed to be a general rule, that an agent with limited powers cannot bind his principal when he transcends his power. It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority. Yet, if the principal has, by his declaration or conduct, authorized the opinion that he had given more extensive powers to his agent, than were in fact given; he could not be permitted to avail himself of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. But the defendants in this cause cannot allege that they have been deceived. They were the intimate correspondents of the plaintiffs, from whom they received a copy of the contract. The letter which transmitted it, requests their friendly supervision of the conduct of Mr. Delprat, and desires them not to pay the money for which the plaintiffs had given him a credit with them, in case of "a moral certainty" that it would not be employed for the purposes of his agency. In the course of the correspondence between the plaintiffs and defendants, we find several letters written during the continuance of Mr. Delprat's credit with the latter, which shows the determination of the former not to approve of advances beyond that credit. In their letter of the 24th of June, 1819, the plaintiffs expressly caution the defendants, should they think proper to remit in Mr. Delprat's bills, the nature of which they are well acquainted with, that they (the

defendants,) allow him the same credit that they do other persons, from whom they take bills, in the persuasion of their solidity, and of the reality of the transaction on which the bills are issued. They add, "This is not the effect of any want of confidence in our agent, but merely profluing from our invariable rule, to limit and circumscribe the credits we allow." The letters from the defendants show a perfect understanding, on their part, of the terms on which Mr. Delprat's bills were to be taken. On the 11th May, 1819, announcing that he had filled his credit, they say: "In addition to it, he has expressed an anxiety that we should negotiate his drafts on you, payable in London, for about £3000 sterling, or that we should take his drafts on Amsterdam, for a similar value. The personal regard which we bear for Mr. Delprat, would have induced us promptly to accede to his request, had not the restriction laid upon us, of not permitting him to exceed, but for a few hundred dollars, the credit you give him, and the total absence of any indication from you of a wish for us to interfere in his pecuniary arrangements, in any other than the mode marked by the credit, led us to believe that our negotiations or purchase of his drafts, was neither wished nor contemplated by you." And in their letter of the 7th of September, 1822, enclosing the order of Mr. Delprat on the plaintiffs, for any balances belonging to him in their hands; so far from complaining of the protest of the bills, they say; "We can, of course, only consider this order as applying to the balance that may possibly accrue to him, upon the settlement of your account."

Messrs. Le Roy, Bayard & Co. then, were not deceived by the plaintiffs. Unfortunately for themselves, they placed too much confidence in Mr. Delprat. They took his bills, as they were cautioned to do, in the letter of the 24th June, 1819, "in the persuasion of their solidity, and of the reality of the transaction on which they were issued." If in this they were mistaken, the responsibility and the loss are their own. The 4th and 5th questions have been waived by the parties, and do not properly arise in the case. They are on exceptions taken in the trial of the cause, which could not be brought before the Court after verdict, but on a motion for a new trial, which was not made.

The 6th question, whether a judgment can be rendered on the verdict of the jury, has been answered, so far as this Court can answer it. We do not understand it as referring to the amount of the verdict, for on that the Circuit Court alone can decide. If it is intended to repeat, in another form, the question whether the plaintiffs can maintain their action, as

the holders of bills, accepted and paid, *supra* protest, for the honour of the drawers; it is already answered.

The decision of a majority of this Court, on the points on which the Judges of the Circuit Court were divided, will be certified in conformity with the foregoing opinion.

This cause came on to be heard, on a certificate of division of opinion of the Judges of the Circuit Court of the United States, for the Southern District of New-York, and on the points on which the said Judges were divided in opinion, and was argued by counsel, on consideration whereof, This Court is of opinion—

1st. That the authority to John C. Delprat to draw on the plaintiffs, did not amount to an acceptance of the bills.

2d and 3d. That the bills mentioned in the declaration were drawn by the said Delprat, not under the authority of the plaintiffs, but on his own account; and the plaintiffs were not bound to accept and pay them, unless funds of the drawer came to their hands.

4th and 5th. These questions are understood to be waived, and do not appear to arise in the case.

6th. The 6th question is decided by the answer to the 2d and 3d, so far as respects the right of the plaintiffs to maintain their action. On the *quantum* of damages, this Court can give no opinion.

All which is ordered to be certified to the Court of the United States, for the second Circuit and District of New-York.

DANIEL PARKER, PLAINTIFF IN ERROR, *vs.* THE UNITED STATES.

The Adjutant and Inspector General of the Army of the United States, was not entitled to double rations, from the 30th of September 1818, to the 31st of May 1821.

The President of the United States, has a discretionary power to allow such additional number of rations, to officers commanding at separate posts, as he may think just, having respect to the special circumstances of each post. The law granting this authority, is not imperative; and in the exercise of his discretion, the President may allow or refuse to allow, additional rations, as in his opinion he may deem proper. {296}

The Secretary of War, as the legitimate organ of the President, under a general authority from him, may exercise the power, and make the allowance, to officers having a separate command. {297}

No officer is entitled to the additional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the Executive. The allowance cannot be made to more than one officer at the same station. {297}

In the discharge of his ordinary duties, the Adjutant and Inspector General, has no distinct command; his duties consist in details of service, and not in active military command. {297}

An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander-in-chief, or of a superior officer in command, in the neighbourhood. He must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer. {297}

The general order of the War Department, of 16th March 1816, directing double rations to be allowed to officers commanding *military departments*, is construed to relate to the geographical sections of country, into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command given to the officer commanding each department; it does not relate to the law of the 3d of March 1813, "for the better organization of the General Staff of the Army." {297}

WRIT of error to the Circuit Court, for the county of Washington, in the District of Columbia.

This case was submitted to the Court, without argument, by Mr. Jones, for the plaintiff in error, and by Mr. Wirt, Attorney General, for the United States.

All the material facts of the case are stated in the opinion of the Court; which was delivered by Mr. Justice DUVAL.—

An action was commenced in the Circuit Court, by the United States, against the plaintiff in error, to recover the sum of $2337 60, which he had received from Mr. Leslie, the paymaster, then stationed at the seat of government, on a claim for double rations, due him in his capacity of Adjutant and Inspector General of the army of the United States, from the

30th of September 1818, to the 31st of May 1821. On the settlement of the account of the paymaster, this item was disallowed by the second Auditor, who considered it as wrongfully paid; and the amount was afterwards directed to be charged to the personal account of General Parker.

The office of Adjutant and Inspector General of the army, with the rank, pay, and emoluments of a Brigadier General, was created by the Act of March 3, 1813. The plaintiff in error was appointed to that office; and his commission bears date on the 1st May 1816, with the rank of Brigadier General, from 22d November 1814.

The pay and emoluments of the officers of the army, are fixed by the Act of 16th March 1802; and the Act of 12th April 1808. By the fifth section of the first mentioned Act, it is provided, that the commanding officers of each separate post, shall be entitled to such additional number of rations, as the President of the United States shall, from time to time, direct, having respect to the special circumstances of each post. Under this authority, the President has, at various times, designated military posts and stations, and allowed double rations to the commanding officers; and in the case of General Wilkinson, when stationed at New-Orleans, and commanding there, in quality of a commanding officer at a separate post, he allowed that officer treble rations. It appears by the record and documents referred to in this case, that on the 25th August 1812, the President ordered, that Generals commanding separate armies, should receive double rations.

In February 1814, an order was issued by the War Department, on the subject of double rations, of which the following is an extract:—"It is ordered, that General or other officers commanding districts, shall, while so doing, receive double rations; which will supersede all other grants of double rations at posts within the district."

On the 6th March 1816, a general order was issued, in the words following:—"Generals commanding Divisions; Officers commanding Military Departments; and all officers while in the command of permanent posts and garrisons, separate from the stations of commandants of departments, which subject them to the additional expense of independent commands, are allowed double rations. No more than one officer can be entitled to double rations, at the same station."

The Adjutant and Inspector General performed the duties of his office from November 1814, and charged the compensation as allowed by law, until the year 1816, when a difficulty arose on the subject of his fuel and quarters, from the circumstance of there being no disbursing office in the Quartermaster's department, at the seat of government; and from the regulations

of the War Department, then in force, prohibiting an allowance in money, to be made to officers in lieu of these emoluments. The Secretary of War then issued the following order: "A commutation of double rations, is allowed to the Adjutant and Inspector General, in lieu of fuel and quarters."

Under this authority, he claimed and was allowed double rations from November 1814; refunding to the government the allowance he had received for fuel and quarters, from the time of his acceptance, until the date of the above order. He continued to receive double rations, making no charge for fuel and quarters, until an order was issued by the Secretary of War, on the 10th of August 1818, to the following effect. "The reason for the allowance to the Chief of the Engineers, and to the Adjutant and Inspector General, in lieu of fuel and quarters, no longer existing, since the establishment of the Quartermaster's department; at the termination of the present quarter, such allowance will cease; and the Quartermaster General will, on requisition, furnish them with fuel and quarters, agreeeably to their respective ranks." The commutation of double rations, ceased accordingly; and the Adjutant and Inspector General continued to charge and receive single rations, only, from the first of October 1818, to the 31st May 1821, when the office was abolished.

The defendant in the Court below, now plaintiff in error, in support of his claim, produced a certificate from Richard Cutts, second comptroller of the Treasury; "that the senior officer of the Engineer Department, stationed at Washington, has charged and been allowed double rations since the first of January 1818. The senior officers of the Quartermaster's, Subsistence and Ordnance Departments, have charged and been allowed double rations since the 27th July 1821; and Major General Brown has charged and been allowed double rations, since the 1st of June 1821, when he was stationed in this city." And also the following regulations: The regulation and general order of the 27th July, 1821, issued by the War Department, allowing to the Quartermaster General, Commissary General of Subsistence, the Colonel of Engineers, and the Chief of the Ordnance Department; (while stationed at the seat of government,) double rations from the date of the said order.

The regulations or general order, duly issued from the War Department, dated the 31st of May, 1821, addressed to the defendant, as Adjutant and Inspector General; directing him, among other things, to hand over the records and files of his office to Major General Brown, on the next day, being the first of June 1821; the said Major General having from the time he had assumed command, and had relieved the said Adjutant and Inspector General, at the seat of government, pursuant to the

last mentioned order, been allowed and paid double rations, as certified by the second comptroller; which regulation or general order is in the following words: "The Adjutant General, under the law of the 2d of March last, being attached to the Major General commanding the army, and now absent, you will, to-morrow, pass over the records and files of your office to Major General Brown, and will assume the duties of Paymaster General. Major General Brown has been advised of this order; and Colonel Towson will be instructed to hand over the papers and records of the pay department to you." That the Brigadiers General of the Army of the United States, have all been regularly allowed double rations, since the said general order and regulation of the 6th of March 1816. That the defendant continued at the head of the department of Adjutant and Inspector General, and stationed at the seat of government, from the time of his appointment and commission, as such, until the 31st of May 1821, and until he was relieved by Major General Brown as before mentioned.

The defendant then proved, by Thomas S. Jessup, Quartermaster General, that in his opinion, and according to the general usage of the army, the department of Adjutant and Inspector General was a military department; and that the defendant, whilst exercising that office, was commandant of a military department; and as such, was subject to the additional expense of an independent command.

The declaration in this cause is founded on a transcript from the Treasury, certified in the usual form, and contained a count for money had and received, and other counts not necessary to be mentioned; issue was joined on the plea of *non assumpsit;* and by agreement of counsel, a verdict for the United States was taken for the sum claimed, subject to the opinion of the Court upon the laws of the United States relative to the pay and emoluments of the officers of the army, and the regulations and orders of the executive department, issued in pursuance of those laws. The Court, on consideration, gave judgment in favour of the United States; and the cause is now before this Court, by writ of error, for their decision.

The claim of the plaintiff in error to double rations, as charged, rests altogether upon a correct construction of the 5th section of the Act of the 16th of March, 1802, and of the regulations and orders of the executive department, issued in pursuance of that section. The President of the United States has a discretionary power to allow such additional number of rations to officers commanding at separate posts, as he may think just; having respect to the special circumstances of each post. The law granting this authority, is not imperative, and in the exercise of his discretion, the President may allow, or

refuse to allow, additional rations, as in his opinion he may deem just.

The reason of the authority to grant the allowance is obvious. By an independent command, at a separate post, the officer is subject to additional expense, and an increase of duty. An officer may be said to command at a separate post, when he is out of the reach of the orders of the Commander in chief, or of a superior officer, in command in the neighbourhood. He must then issue the necessary orders to the troops under his command; it being impracticable to receive them from a superior officer. His authority is the source from which they must flow.

There can be no controversy about additional rations, if the President makes the allowance. He may issue the order himself, or it may be done by the Secretary of War, with his approbation. The Secretary of War, as the legitimate organ of the President, under a general authority from him, may exercise the power, and make the allowance to officers having a separate command. The language of the law is plain and unambiguous. No officer is entitled to the additional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the Executive. The allowance cannot be made to more than one officer at the same station.

It is not contended, in the case under consideration, that the grant was made by the President; but the plaintiff in error claims it under the orders which have been recited, and which are spread upon the record; and because officers of equal rank, and in his opinion similarly circumstanced, have received the additional allowance. Double rations form no part of the regular and legal emoluments of a Brigadier General, and can only be claimed under circumstances before enumerated. The plaintiff in error seems to rely, with more confidence, on the order of the 6th of March 1816, taken in connexion with the opinion of General Jessup. That order directs the additional allowance to be made to Generals commanding divisions, and to officers commanding military *departments*, &c.; and General Jessup was of opinion, that, according to the general usage of the army, the department of Adjutant and Inspector General, was a military department; and that whilst exercising that office, he was commandant of a military department; and, as such, subject to the expense of an independent command.

The record contains no evidence, that the Adjutant and Inspector General was ever ordered to an independent or separate command. In the discharge of his ordinary duties, he has no distinct command; his duties consist in details of service, and not in active military command. The order of the

16th of March 1816, directing double rations to be allowed to officers commanding *military departments*, is construed to relate to the geographical sections of country, into which the two divisions of the army are divided, and which were denominated *departments;* and intended to designate the extent of actual command, given to the officer commanding each department; and that it does not relate to the law of the 3d of March 1813, for the better organization of the general staff of the army. This appears to have been the construction given to the order by the war department, as none of the staff officers created by that Act, with the exception of the plaintiff in error, ever made a claim for double rations; and the claim under consideration, was disallowed by the accounting officers of the war department.

During the time the Adjutant and Inspector General was stationed at the seat of government, comprehending the space for which double rations are claimed, it does not appear, that there was any recognised commanding officer. The staff officers, then stationed at the seat of government, were subject to the authority of the Secretary of War, and under his direct and exclusive control.

It is the opinion of the Court, that the claim of the plaintiff in error, is not sanctioned by the Act of the 16th of March 1802, nor by the regulations and orders of the executive department, issued in pursuance of that law.

The judgment of the Circuit Court is affirmed, with costs.

THE MECHANICS BANK OF ALEXANDRIA, APPELLANTS, *vs.* LOUISA AND ANNA MARIA SETON, APPELLEES, BY THEIR GUARDIAN, &c.

Although it seems to be a general rule, that a Court of Chancery will not decree a specific performance of contracts, except for the purchase of lands, or things which relate to the realty, and are of a permanent nature; and that where contracts are for chattels, and compensation can be made in damages, the parties may be left to their remedy at law; yet, notwithstanding this distinction between personal contracts for goods, and contracts for lands, there are many cases to be found, where specific performance of contracts relating to personalty, have been enforced in chancery; and Courts will only weigh with greater nicety, contracts of this description, than such as relate to lands. {305}

Although an objection, for want of proper parties, may be taken at the hearing, yet the objection ought not to prevail upon the final hearing of an appeal; except in very strong cases, and where the Court perceives a necessary and indispensable party is wanting. {306}

All persons materially interested in the subject of a suit in chancery, ought to be made parties, either plaintiffs or defendants; but this is a rule established for the convenient administration of justice, and is more or less within the discretion of the Court; and it should be restricted to parties whose interests are in the issue, and to be affected by the decree. The relief granted will always be so modified, as not to affect the interests of others. {306}

The cross examination of a witness by the opposite party, is considered as a waiver of exceptions to the regularity of his deposition. {307}

By the rules of this Court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record, as evidence; unless objection was taken thereto in the Court below; but the same shall otherwise be deemed to have been taken by consent." {307}

It is not a correct construction of the 3d and 21st sections of the Act of Congress, incorporating the Mechanics Bank of Alexandria, that the stock of the bank shall be deemed to belong to the persons in whose names it stands upon the books of the bank, and that the bank is not bound to recognise the interests of any *cestuy que trust*, and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank. {308}

Full notice of a trust, draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. {309}

It is well settled in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust. {309}

A subsequent Board of Directors of a bank, is to be considered as knowing all the circumstances communicated, or known to a previous Board. {309}

It is a well settled rule, that a Court is not bound to take notice of any interest acquired in the subject matter of the suit, pending the dispute. {310}

(The Mechanics Bank of Alexandria *vs.* Louisa & Maria Seton.)

APPEAL from the Circuit Court for the county of Alexandria.

This suit was instituted on the Chancery side of the Circuit Court, by the appellees, complainants in that Court, against the Mechanics Bank of Alexandria; to compel them to permit a transfer to be made of three thousand dollars of the capital stock of the bank, standing in the name of Adam Lynn, and held by him as trustee of the complainants.

The bill charges, that the complainants' grandfather, John Wise, to make provision for the support of his children and grandchildren, had made sale, in 1815, of an establishment called the City Tavern, at the price of 14,000 dollars; of which 10,000 dollars were paid by the transfer of that amount of United States six per cent. stock, made by the purchasers to the said Adam Lynn, the nephew and agent of the said John Wise, for his use. That the residue, 4000 dollars, was paid to the said Adam, in money, to be by him invested in stocks, for the use, and subject to the control, of the said John Wise. That out of this sum, the said Adam purchased from one James Sanderson 3000 dollars of the capital stock of the bank, which was in like manner transferred to him; and that although no trust was in terms declared, in the transfer of either of the said stocks, they were both avowedly purchased and held by the said Adam, in his character of agent and trustee for Wise. That on the 29th of April 1815, the said John executed a deed to the said Adam, by which he conveyed to him the said stocks described as standing in the said Adam's name, in trust, for the use of the said John during his life, as to the dividends, and after his death, then, as to the bank stock, to the use of the complainants;—and that he has since died. That when the purchase of the bank stock was made, and when it was transferred to the said Adam, it was well known to the President and Directors of the bank, that the purchase was made, and the transfer received by him, in his fiduciary character.

That the bank stock was purchased on the 11th of February 1815, from one James Sanderson, at a small advance; and on that day, a payment of 720 dollars was made in part of the purchase money, and as Sanderson had obtained a discount from the bank, on the pledge of all the stock he held in it, it became necessary to know on what terms the Board of Directors would permit a transfer.

That this application was accordingly made by the said Adam, who distinctly stated that the purchase was to be made for the benefit of the said John Wise, was to be paid for in his funds, and was to be transferred to the said Adam for his use. He further proposed to the Board, as an accommodation to himself, that he should be allowed to discharge a part of the purchase money to Sanderson, by assuming on himself a part of

Sanderson's debt to the bank, and continuing to that extent the lien the bank then held on the stock to be transferred. That this proposal was rejected, distinctly, on the ground that the Board must consider the said John Wise as the owner of the stock.

That the said Adam then paid 2400 dollars to the bank, in discharge of the said Sanderson's stock debt; which being done, the transfer was permitted, and, on the 15th of March 1815, was made to the said Adam, as trustee, though the trust was not declared in the transfer. That it was, however, officially made known, previously to the transfer, and was afterwards frequently a subject of conversation amongst the directors at the Board.

That the complainants having expressed to the said Adam their desire that he would transfer their stock to their guardian, he offered himself ready to do so; but, that on application at the bank, permission was refused; on the allegation, that he was a debtor to the bank, and that it held a lien for that debt on all its stock which stood in his name.

That the said Adam was proprietor of other stock in the bank in his own right, to the amount of 18,014 dollars, and had a discount on it to the amount of 15,360 dollars, which was little more than the sum permitted to be loaned on stock security, by a by-law of the bank—that is to say, 4-5ths of the amount of such stock.

The bill further charges, that when the said Lynn's debt to the bank was contracted, he was one of the directors; and that by the 9th article of the charter of Incorporation, the President and Directors were prohibited from receiving discounts or loans on accommodation, beyond 5000 dollars. That all the loans to him were of that description; and that so far as they exceed 5000 dollars, being in violation of the charter, can create no lien under it. The bill, after propounding special interrogatories, corresponding with the previous allegations, prays that the bank may be compelled to open its transfer book, and to permit Lynn to transfer the stock, and for general relief.

The answer denies that the Board of Directors had notice of the fiduciary character in which Lynn held the stock claimed by the complainants. It avers, that at the time the answer was put in, there was no stock standing, in his name, on the books; the whole of the stock which stood in his name having been applied to the payment of his debts to the bank, under articles of agreement between him and the cashier.

It admits, that Lynn had received accommodation loans on stock, to an amount exceeding 5000 dollars, but asserts that loans of that description did not fall within the prohibition of

the charter; but if they did, it cannot affect the bank's right, claiming as purchasers under the contract before mentioned.

The purchase of the stock by Lynn in his fiduciary character, and the knowledge of that fact by the Board of Directors, officially and individually, is claimed to be fully proved by the testimony of the said Adam Lynn, a director of the bank, and by that of Robert Young, President, and of Daniel M'Leod and John Gird, directors.

The special agreement under which the respondents claim the stock, appears to have been entered into on the 30th day of May 1821, nearly a year after the bill had been filed. By this contract, Lynn agreed at once to transfer all his stock, except that claimed by the complainants; for the transfer of this, he gave a power of attorney, which by agreement was not to be executed by a transfer, until the decision of the Court on the respondent's claim of lien in this suit.

The Circuit Court, on hearing, decreed a transfer; from which decree, this appeal was entered.

Mr. Swann, and Mr. Wirt, for the appellants.—

The Mechanics Bank of Alexandria did not know of the trust; this stock stood in the name of Adam Lynn, and they had no notice of any other ownership in it; no trust was declared upon the books of the bank; and by the provisions of the charter, the persons who appear as stockholders upon the books, are the only stockholders. By the charter, no one who is a debtor to the bank, can transfer stock owned by him, the bank having a prior lien on the same for their debt.

The claim of the plaintiffs below, is resisted on the following grounds:—

1. Adam Lynn made a special agreement to transfer this stock to the bank.

2. Adam Lynn was a debtor to the bank, and this stock standing in his name, on the books of the bank, without a declaration of the trust, was properly retained as a security for the debt due by him.

3. The subject in controversy in this case, is not proper for the decision of a Court of Chancery. There cannot be a specific performance decreed by this Court, as the stock cannot be designated, or specially described. 1 *Mad. Chan.* 403. 1 *P. Williams*, 570.

4. By the charter of the bank, the only evidence of ownership of stock, is the books of the bank. In the case of a corporation existing under a law, the forms prescribed by the law must be complied with. 17 *Mass. Rep.* 1. 2 *Black. Com.* 127.

5. In this case, it was considered by the complainants, that

(The Mechanics Bank of Alexandria *vs.* Louisa & Maria Seton.)

Adam Lynn should be a party to the bill, and a rule was taken on him to appear; but the Court went on to a hearing and decision of the suit, without his having been made a party. The Court will, therefore, having this fact upon the proceedings, *ex officio*, turn the parties out of Court. Duguid *vs.* Patterson 1 *Hen. & Mum.* 445.

Mr. Jones, and Mr. Taylor, for the appellees.

1. As to the specific lien claimed by the appellants, under a power of attorney, given by Adam Lynn. It was granted after the bill of the complainants was filed, and is therefore of no value. The transfer, by the power of attorney, was also a violation of the agreement, under which it was given.

But, if this is not an answer to the claim of specific lien; the transfer of the stock, by power of attorney, was made, with notice of the right of the complainants.

2. It does not appear, that the debt due by Adam Lynn to the bank, arose after the purchase of this stock; and therefore no new credit was given upon this stock. The trust was known to the Board of Directors, when the stock was transferred by Sanderson to Lynn; and from that time they dealt with the trustee subject to the trust. A corporation, by the decisions of this Court, is like an individual, in transactions of this kind; and the succeeding Board of Directors were bound by the circumstances which occurred when the trust commenced.

3. The bank were the trustees of the complainants, either by an original contract, or as trustees, resulting from the payment of the purchase money for the stock out of their funds. 2 *Vez. & Beam.* 388. 5 *Vezey*, 43. 1 *P. Williams*, 112. 1 *Vezey*, 275. 10 *Vezey*, 360. 1 *Vezey, jun.* 32. 42. As to constructive notice, were cited, 8 *Comyn's Dig. N. Ed.* 363, 15*th division*. 2*d division*, 10. 20, 21. 15. 358.

4. This is the case of *trust*, which is the *peculium* of a Court of Chancery; and *the number of shares* which are claimed, is a sufficient designation of the property. The original shares bought of Sanderson, remained in the name of Adam Lynn, when the bill was filed.

5. The provisions of the charter, relative to evidence of ownership of stock, can only apply, when parties are the holders of stock, in their own right. The practice of the bank to hold stock as mortgagees, shows a different construction of the charter, by the bank itself, from that which is claimed in this case.

6. The rules of the Court of Chancery are, that all persons who were parties to the transactions, and all who must be before the Court, for the purposes of complete justice in the case, must be made parties. It was not deemed necessary to make Adam Lynn a party, as he was willing to do all that the

Court would have required from him; and it was the bank only, who, having the control of the stock, could make the transfer, sought by the complainants.

Mr. Justice THOMPSON delivered the opinion of the Court.—

The appellees, who were the complainants in the Court below, filed their bill against the Mechanics Bank of Alexandria, setting out their right to three thousand dollars of the capital stock of that bank, which was standing in the name of Adam Lynn; but which was avowedly purchased and held by him, as trustee for John Wise, the grandfather of the complainants, and from whom they derived their right and title to the stock in question. That they were desirous of having their stock transferred to their guardian, which the trustee, Adam Lynn, was willing to do, and offered to transfer the same; but that on application to the bank, permission was refused, on the allegation that Adam Lynn was a debtor to the bank, and that it held a lien for that debt, on all the stock of the bank, which stood in his name. The bill alleges, that when the stock was purchased by Adam Lynn, for John Wise, and transferred to him upon the books of the bank, it was well known to the President and Directors, that the purchase was made by, and transferred to Lynn, in his character of trustee for John Wise, although the trust was not expressed in the transfer.

The bill prays, that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the three thousand dollars, in stock, to the said Louisa and Anna Maria Seton, or to their guardian, Nathaniel S. Wise.

The bank, by its answer, denies that the Board of Directors knew, or had any notice, that Adam Lynn held the stock as trustee; but alleges, that all the stock standing upon the books of the bank, in the name of Adam Lynn, was considered by the Board of Directors as his own stock; and avers, that at the time the answer was put in, there was no stock standing in his name on the books, but that the whole of it had been applied by the bank to the payment of his debts to it; according to articles of agreement between him and the cashier of the bank.

The bank also sets up the right, under its charter, to hold the stock, for the payment of Lynn's debt; but had, under the agreement made with the cashier, as before mentioned, become the purchaser of the stock, for a full and fair consideration; without any knowledge that the complainants had any interest in the same.

The Court below, upon the bill, answer, and exhibits, and proofs, taken in the cause, decreed that the bank should cause its transfer book to be opened, and to permit Adam Lynn to

transfer the stock to Nathaniel S. Wise, guardian of the complainants, to be by him held in trust for their use. From this decree there is an appeal to this Court, and the following points have been made, upon which a reversal of that decree is claimed.

1. That the subject matter of the bill is not properly cognizable in a Court of Chancery; but that the remedy is at law, and the party to be compensated in damages.

2. That there is a want of proper parties.

3. That upon the merits, the bank has a right to hold and apply the stock, in payment of Adam Lynn's debt to it.

With respect to the first objection, it has been said that a Court of Chancery will not decree a specific performance of contracts; except for the purchase of lands or things that relate to the realty, and are of a permanent nature; and, that where the contracts are for chattels, and compensation can be made in damages, the parties must be left to their remedy at law. But notwithstanding this distinction between personal contracts for goods, and contracts for lands, is to be found laid down in the books, as a general rule; yet there are many cases, to be found, where specific performance of contracts, relating to personalty, have been enforced in chancery; and Courts will only weigh with greater nicety, contracts of this description, than such as relate to lands.

But the application of this distinction to the present case, is not perceived. If this had been a bill, filed against the bank, to compel a specific performance of any contract entered into with it, for the sale of stock, it might then be urged, that compensation for a breach of the contract, might be made in damages; and that the remedy was properly to be sought in a Court of law. But the bill d' s not set up any contract between the complainants and the bank; nor does it seek a specific performance of any express contract whatever, entered into with the bank. It only asks, that the bank may be compelled to open its transfer book, and permit Adam Lynn to transfer the stock. By the charter and by-laws of the bank, such transfer could only be made upon the books of the bank; and it was by their consent alone, that this could be done.

Although it might be the duty of the bank to permit such transfer, it would be difficult to sustain an action at law, for refusing to open its books, and permit the transfer. Nor have the appellants shown such a claim to the stock, as to authorize the Court to turn the appellees round to their remedy at law, against Lynn, admitting they might have it. At all events, the remedy at law is not clear and perfect; and it is not a case for compensation in damages, but for specific performance; which can only be enforced in a Court of Chancery.

(The Mechanics Bank of Alexandria *vs.* Louisa & Maria Seton.)

2d. The second objection, that Adam Lynn ought to have been made a defendant, would seem to grow out of a misapprehension of the object of this bill, and the specific relief sought by it.

It ought to be observed here, preliminarily, as matter of practice, that although an objection for want of proper parties may be taken at the hearing; yet the objection ought not to prevail upon the final hearing on appeal; except in very strong cases, and when the Court perceives that a necessary and indispensable party is wanting.

The objection should be taken at an earlier stage in the proceedings, by which great delay and expense would be avoided.

The general rule, as to parties, undoubtedly is, that when a bill is brought for relief, all persons materially interested in the subject of the suit, ought to be made parties, either as plaintiffs or defendants; in order to prevent a multiplicity of suits, and that there may be a complete and final decree between all parties interested. But, this is a rule established for the convenient administration of justice, and is subject to many exceptions; and is, more or less, a matter of discretion in the Court; and ought to be restricted to parties, whose interest is involved in the issue, and to be affected by the decree. The relief granted, will always be so modified, as not to affect the interest of others. 2 *Mad. Chancery*, 180. 1 *Johns. Chancery Cases*, 350.

Where was the necessity, or even propriety, of making Lynn a party? No relief is sought against him. The bill expressly alleges that he was perfectly willing to make the transfer; but permission was refused by the bank. There is no allegation in the bill, upon which a decree could be made against Lynn; and it is a well settled rule, that no one need be made a party, against whom, if brought to a hearing, the plaintiff can have no decree. 2 *Mad. Ch.* 184. 3 *P. Will.* 310—*Note* 1.

The contest, with respect to the right to the stock, is between the complainants and the bank; and it cannot be necessary to bring Lynn into the suit, in order to determine that question. He claims no right to the stock; and if the bank has established its right to hold it, for the payment of Lynn's debt, the complainants have no pretence for requiring the books of the bank to be opened, and to permit the transfer to be made, as prayed in the bill. The bank cannot compel the complainants to bring Lynn before the Court, as a defendant; for the purpose of litigating questions between themselves, with which the complainants have no concern. No objection to the decree can, therefore, be made for want of proper parties.

The remaining inquiry is, whether the bank is entitled to hold this stock, as security, or apply it in payment of Lynn's

debt; either by virtue of its charter, or, under the agreement between him and the cashier.

An objection, however, has been made, preliminarily, to this Court's noticing the deposition of Adam Lynn; because, as is alleged, it was taken after the cause was set down for hearing, and without any order of the Court for that purpose.

Admitting this to have been irregular, no objection appears to have been made in the Court below, to the reading of the deposition; and had it been made, it ought not to have prevailed even there; because the defendants cross-examined the witness, which would be considered a waiver of the irregularity.

But, at all events, the objection cannot be listened to here, according to the express rule of this Court, (*February Term*, 1824,) which declares, "that in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record as evidence; unless objection was taken thereto, in the Court below, and entered of record; but the same shall otherwise be deemed to have been admitted by consent."

It is deemed unnecessary to enter into an examination of the proofs in the cause, to show that, in point of fact, the stock in question was held by Lynn, in trust for the complainants; and that this fact was known to the Board of Directors, when it was transferred to him by James Sanderson. The evidence establishes these points, beyond any reasonable ground of doubt; and the real question is, whether the bank, with full knowledge of the Board of Directors, that this stock was not the property of Lynn, but held by him in trust for the appellees; can assert a lien upon it for the private debt of Lynn, either under the charter or the agreement, made with Chapin, and the transfer made by him to the bank.

The equity of the case must strike every one very forcibly; as being decidedly with the appellees. And unless the claims of the bank can be sustained, by the clear and positive provisions of its charter, the decree of the Court below ought to be affirmed.

This claim is asserted, under the provisions of the 3d and 21st sections of the Act of Congress, incorporating the bank.

The third section, after providing for the opening the subscription for the stock, and pointing out the manner in which the excess shall be reduced, in case the subscription shall exceed the number of shares allowed to be subscribed, has this proviso; "Provided always, that it is hereby expressly understood, that all the subscriptions, and shares obtained in consequence thereof, shall be deemed and held to be for the sole and exclusive use and benefit of the persons, co-part-

nerships, or bodies politic, subscribing, or in whose behalf the subscriptions, respectively, shall be declared to be made, at the time of making the same; and all bargains, contracts, promises, agreements and engagements, in any wise contravening this provision, shall be void." The 21st section declares, "that the shares of the capital stock, shall be transferable at any time, according to such rules as may be established, by the President and Directors; but no stock shall be transferred, the *holder* thereof being indebted to the bank, until such debt be satisfied; except the President and Directors shall otherwise order it."

These sections, when taken together, have been supposed to require a construction, that the stock shall be deemed to belong to the person, in whose name it stands upon the books of the bank; and that the bank is not bound to recognise the interest of any *cestuy que trust;* and may refuse to permit the stock to be transferred, whilst the nominal holder is indebted to the bank.

This construction, however, in the opinion of the Court, cannot be sustained. The third section must clearly be understood as applying to the first subscription for the stock; and was intended to prevent one person subscribing for stock in the name of another, for his own benefit.

The construction of the 21st section, will depend upon the interpretation to be given to the word *holder*, as there used. This term is not, necessarily, restricted to the nominal holder. It will admit of a broader and more enlarged meaning; and may well be applied to the party, really and beneficially interested in the stock. And there can be no good reasons why it should not be so applied, when the bank is fully apprized of all circumstances in relation to the stock, and knows who is the real holder thereof.

This provision was intended to put into the hands of the bank, additional security for debts due from stockholders. But, when it is known, that the person in whose name the stock stands, has no interest in it, he will acquire no credit upon the strength of such stock; and that such was the understanding of the bank, in this case, is clearly shown by the evidence. For, when the transfer was made to Lynn, he asked to have the discount continued to him, which Sanderson, from whom he purchased, had upon the stock. But this was refused, on the ground that the stock did not belong to Lynn, but to Wise. There is no evidence in the cause to show, that Lynn's debt was contracted with the bank after the stock was transferred to him; or that he has, in any manner, obtained credit with the bank on account thereof; but the contrary is fairly to be understood from the proofs.—Nor does the bank allege the insol-

vency of Lynn; or that it has not a full and complete remedy against him, without having recourse to this stock.

To permit the bank, under such circumstances, to avail itself of this stock to satisfy a debt contracted without any reference to it as security, and with full knowledge that Lynn held it in trust for the complainants; would be repugnant to the most obvious principles of justice and equity. Suppose the trust had been expressly declared upon the transfer book of the bank; would there be the least colour for sustaining the claim now set up? And yet Lynn would be the legal holder of the stock, in such case, as much as in the one now before the Court. Full notice of a trust draws after it all the consequences of an express declaration of the trust, as to all persons chargeable with such notice.

It is a well settled rule in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees, and bound, with respect to that special property, to the execution of the trust. (*2 Mad. Ch.* 125. *1 Sch. & Lef.* 262.)

Notice to an agent is notice to his principal. If it were held otherwise, it would cause great inconvenience; and notice would be avoided in every case, by employing agents. *2 Mad. Ch.* 326. Notice to the Board of Directors, when this stock was transferred to Lynn, that he held it as trustee only, was notice to the bank; and no subsequent change of Directors, could require a new notice of this fact. So that if the bank had sustained any injury, by reason of a subsequent *Board* not knowing that Lynn held the stock in trust; it would result from the negligence of its own agents, and could not be visited upon the complainants. But no such injury is pretended. From any thing that appears to the contrary, Lynn is fully able to pay his debt to the bank.

The case of the Union Bank of Georgetown *vs.* Laird, (*2 Wheat.* 390,) has been supposed to have a strong bearing upon the one now before the Court. But the circumstances of the two cases are very dissimilar. In the former, Patton was the real, as well as the nominal holder of the stock, when he contracted his debt with the bank, and when his acceptance fell due, and the lien of the bank, no doubt, attached upon the stock; and this was previous to the assignment of it to Laird; and the question there was, whether the bank had done any thing which ought to be considered a waiver of the lien. But, in the present case, Lynn never was the real owner of the stock, and the bank well understood that he held it as trustee, and no lien for Lynn's debt ever attached upon it.

The appellants cannot, therefore, under any provisions in their charter, apply this stock to their own use, for the debt of

Lynn, to the prejudice of the rights of the known *cestuy que trusts.*

Nor is there any ground upon which the claim of the bank can be sustained, under the agreement made between Lynn and Chapin, the cashier, and the transfer thereof, made by the latter to the bank. If the bank, as has already been shown, was chargeable with the knowledge that Lynn was a mere trustee, it could acquire no title from him, discharged of the trust; and if neccessary, might itself be compelled to execute the trust. Nor has the bank any title to this stock under the transfer made by Chapin. This was done without any legal authority, being several months after Lynn had revoked the power of attorney, under which the transfer was pretended to be made; and with full knowledge that Lynn was not the owner of the stock. But another and complete answer to the whole of this arrangement, between Chapin and Lynn, is; that it was made long after the bill in this case was filed; and it is a well settled rule, that the Court is not bound to take notice of any interest acquired in the subject matter of the suit, pending the dispute.

The decree of the Court below, must accordingly be affirmed, with costs.

ROBERT BARRY, PLAINTIFF IN ERROR, *vs.* THOMAS FOYLES.

The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error. Robert Barry appeared, gave special bail, and discharged the attachment. The plaintiff below, then filed a declaration of "*indebitatus assumpsit*," "for money had and received," and "for goods sold and delivered," to which Robert Barry pleaded the general issue. The parties went to trial, and a verdict and judgment were rendered for the defendant in error.

The Court attaches no importance to the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved, by the entry of bail, and the appearance of the defendant. The defendant having pleaded to the declaration, the cause stood as if the suit had been brought in the usual manner, and no reference can be had to the proceedings on the attachment {315}

Where the general agent of parties carrying on business in a tan-yard, instead of a journal of hides received for the parties from day to day, gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement, up to the periods when the certificates bore date; such certificates are equally binding, as certificates detailing the separate transactions of each day; and may be read in evidence to charge the parties, whose agent the person giving the certificates was. {316}

The principle is, that a contract made by co-partners is several as well as joint, and the assumpsit is made by all and by each. It is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it at the time of trial. {317}

The declaration in an action against one partner only, never gives notice of the claim being on a partnership transaction. The proceeding is always, as if the party sued was the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. {317}

Where the suit is brought upon a partnership transaction, against one of the partners, and the declaration stated a contract with the partner who is sued, and gave no notice that it was made by him with another person, evidence of a joint assumpsit may be given to support such a declaration; and the want of notice, has never been considered as justifying an exception to such evidence at the trial. {317}

ERROR to the Circuit Court for the county of Washington.

In the Circuit Court for the county of Washington, the defendant in error issued an attachment against Robert Barry, the plaintiff in error; and according to the established practice, the plaintiff in the attachment, filed, at the time it was issued, an account or statement of his claim; by which he alleged that Robert Barry, the defendant below, was indebted to him in the

sum of $3,410 25, for debts due from the firm of James D. Barry & Co. assumed by him to pay to the plaintiff in the attachment. This account or statement, was accompanied by an affidavit, that "it was just and true, is it stands stated." The plaintiff in error appeared and gave special bail; and a declaration was then filed, in *indebitatus assumpsit*, &c., and the plea of the general issue entered.

On the trial of the cause, the plaintiff offered in evidence to sustain his case, three paper writings, signed by E. Rice, which are stated, *in extenso*, in the opinion of the Court.

In order to prove the defendant chargeable with the amount delivered by the plaintiff below, Thomas Rice was produced and sworn as a witness; who testified, as set forth in the opinion of the Court.

The counsel for the defendant below objected to the evidence, and the objection being overruled, the case was brought by writ of error to this Court.

Messrs. Coxe and Worthington, for the plaintiffs in error, contended.

1st. That the evidence is not competent and sufficient to charge the plaintiff in error, upon his alledged *assumpsit*.

2nd. That under the declaration of *indebitatus assumpsit*, the evidence is also incompetent and insufficient.

By the statement filed upon oath, the claim of the plaintiff is averred to be a debt due by *James D. Barry, & Co.*, which the defendant below assumed to pay.

The evidence on the part of the plaintiff below did not show such a firm as *James D. Barry, & Co.*; nor did the same prove an implied, much less an express *assumpsit* by Robert Barry.

The plaintiff below complied with the law of Maryland, by stating his cause of action, when the attachment was issued; and the defendant appeared and entered a plea thereto. Subsequently, he filed a declaration of *indebitatus assumpsit*, which was irregular. This cannot be done, and therefore the evidence applied only to the first declaration; which stated an assumption of the debt of James D. Barry, & Co., and no proof was offered of such assumption. The evidence does not show any connexion between Rice and the defendant, nor any authority from Robert Barry, by which his acts or acknowledgments could become binding on him; the plaintiffs did not therefore make out the case spread upon the record by the first declaration.

The papers signed by Rice were improperly admitted. No. 1. is given in the name of *James D. Barry*. The other two refer to transactions in which the defendant is not named.

2. Upon a general declaration in *assumpsit*, the issue is not maintained by proof of a partnership debt.

The general rule, that the defendant, who is charged sepa-

rately for a joint debt, should plead this in abatement, does not apply, when the plaintiff has by his pleadings given no notice of the nature of his demand, until the time of trial, Jordan *vs.* Wilkins, 3 *Wash. Decis.* 112. In the case of Rice *vs.* Shout, 5 *Burr*, 2611, Lord Mansfield adverts strongly to the circumstance, that the defendant was the person with whom the business was transacted. Also cited Abbott *vs.* Smith, 2 *Black.* 947.

3. The agency of Rice was a special agency, and his acknowledgments were not evidence. He might have made entries in the books to charge his principal, but no more. 1 *Esp. Rep.* 375. 2 *Stark. Evid.* 60. Nor does his testimony prove the interest or partnership of Robert Barry, in the dealings to which the papers have reference. 3 *Stark. Evid.* p. 4. 1067.

Mr. Jones for the defendant.

The objections to the proceedings, as they apply to the first and second declarations, have no force. The account filed, when the writ issued, against Robert Barry alone, states his assumption of the partnership debt; and if this was objectionable, it should have been pleaded in abatement.

It was at one time supposed, that in all cases of attachment a second declaration should be filed; but this was afterwards considered as not essential; but the party has at all times a right to vary his pleadings, and even at "the rules" to file a new declaration. To the pleadings in this case, no exception was taken, nor was any objection made at the trial.

The objection to the evidence, as applicable to the account filed, ought not to prevail. If Robert Barry was a partner in the transactions, to which the papers refer, the law raises an assumption. The plaintiff is not tied down to prove an express *assumpsit*, when proof is given that he was a partner; and an action will lie against one partner alone, on his express *assumpsit*.

2. The evidence of debts due by J. D. Barry, & Co. was properly applied to charge Robert Barry, the plaintiff in error. There must always be a plea in abatement, where the parties are not joined. As to joinder of parties; Mr. Foot cited, with other cases, Minor *vs.* the Mechanics Bank of Alexandria, decided *ante* page 46, this Term; and also 5 *Burr*, 2611.

If the evidence could in any way charge the defendant below, it was admissible. Partnership may be proved by circumstances; and the Court did not decide upon the effect of the testimony, but only that it should go, generally, to the Jury. This is a case in which the principal is charged with the acts of the agent, within the scope of his authority; the business of the concern being intrusted to the management of Rice by the parties.

(Barry *vs.* Foyles.)

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is a writ of error to a judgment of the Circuit Court of the United States for the district of Columbia, sitting in the county of Washington. The defendant in error had sued out an attachment against Robert Barry, and had filed an account against James D. Barry & Co., said to be assumed by Robert Barry. Robert Barry appeared, gave special bail, and discharged the attachment. Thomas Foyles then filed a declaration of *indebitatus assumpsit*, for money had and received, and for goods, &c. delivered; to which Robert Barry pleaded the general issue, and the parties went to trial.

At the trial, the plaintiff in the Circuit Court, offered in evidence, three paper writings signed by Edmond Rice; and also produced Thomas Rice, a witness, who swore, that at the time the said paper writings bear date, and for a long time before and after, E. Rice, whose name is signed to the said writings, was foreman and manager of a tan-yard in Washington; kept the books, bought and sold leather, and managed the whole concern for the proprietors; that the said papers are in his hand writing; that the said Foyles, for about seven years, (including the dates of said writings) being a butcher, was in the habit of delivering, from time to time, great numbers of hides, to the said Rice, at the said yard, and had contracted with the said Rice to deliver there all the hides of the cattle slaughtered by him. That the said business was carried on in the name of James D. Barry, living in Washington, till a settlement, which witness understood took place between the said James D. Barry and Robert Barry; after a while it was carried on in the name of Robert Barry. The witness was not present at the settlement, and does not know its nature or terms. During the time that the business was carried on in the name of James D. Barry, Robert Barry (who resided in Baltimore) came about twice a year to the yard in Washington; where he spent considerable time in examining and posting the books, with the said E. Rice. Upon one of these occasions, he directed a parcel of leather, which E. Rice had prepared to send on to him to Baltimore, to be kept in the yard till he should return to Baltimore, or ascertain the price of leather there, and give further directions concerning it. During all the time the business was conducted at Washington in the name of James D. Barry, the greater part of the leather manufactured in the yard was sent on to Baltimore to the defendant, and there disposed of by him.

The following are the paper writings offered in evidence, to which the testimony of Thomas Rice refers.

(Barry vs. Foyles.)

No. 1. Balance due by James D. Barry to Thomas Foyles on settlement, say sixteen-hundred and forty dollars seventy-five cents, up to this date, say April 5th 1817.
$1640 75. EDMOND RICE.

No. 2. Amount of hides and skins received of Mr. Thomas Foyles, from the 1st of April 1817, to this date, say December 27th, 1818.

755 hides at 3 75 per hide,	2831 25
10 Sheep skins at 50 cents each,	5 00
7 Calf skins do. at $1 each,	7 00
	$2843 25

January 13th, 1819. EDMOND RICE.

No. 3. Amount of hides and skins received of Mr. Thomas Foyles, from the 2d of February 1819, to 2d of December 1819.
346 hides at $3 75 each, $1297 50
EDMOND RICE.

The counsel for the defendant objected to the admission of these papers. His objection being overruled, an exception was taken to the opinion.

A verdict was found for the plaintiff below, the judgment on which has been brought into this Court by writ of error.

In argument, some observations were made on the variance between the manner in which the plaintiff in error was charged in the account filed in the attachment, and in the declaration on which the cause was tried. In the account, he is charged on his *assumpsit*, for a sum due from James D. Barry & Co. The declaration charges him as being originally indebted on a a transaction with himself. The Court attaches no importance to this variance, because when the attachment was discharged, by the appearance of the defendant, and giving bail, and the plaintiff, in consequence thereof, filed a declaration, to which the defendant pleaded, the cause stood in Court, as if the suit had been brought in the usual manner; and no reference can be had to the proceedings on the attachment.

Considering the case, as it is made out in the pleadings, the defendant in the Circuit Court is charged, on his original liability, for a transaction of his own. Edmond Rice, having been manager of the whole concern, for the proprietors of the tan-yard, in Washington, with power to buy hides and sell leather, there can be no doubt of his power to charge them for skins and hides, received by him in the course of business. The papers No. 2 and 3, purport, on their face, to be an account of transactions of this description. The only objection made to them, is, that instead of the journal of hides delivered

on each day, the manager has given, at considerable intervals, the total amount of hides received from the last preceding settlement, up to that time. We are not aware of any principle which can make such a general certificate less binding, than one detailing the separate transactions of each day. The proprietors themselves, or either of them, might have made the same acknowledgment; and we perceive no reason why the acknowledgment of the manager, so far as respects the form in which it is made, should not be of the same obligation as that of the proprietors.

The paper No. 1, is more questionable. It does not purport to be given for hides received at the tan-yard, nor does it express the items which constitute the charge; but it is said to be the balance due from James D. Barry, (in whose name the business was conducted,) "on settlement." Edmond Rice, the person who gave this certificate, had authority to give it on account of the transactions of the tan-yard; and it does not appear that he had authority to give it on any other account. It is an additional circumstance, of no inconsiderable weight, that the account closes on the 5th of April, 1817, the day on which the subsequent account, which is avowedly for hides, commences. These circumstances, combined, were, we think, sufficient to justify the submission of this paper, also, to the jury.

The next objection to the admission of these papers, is, that the plaintiff in the Circuit Court, has failed to prove that Robert Barry was one of the proprietors of the tan-yard, while the business was conducted in the name of James D. Barry.

The evidence, on this point, was given by Thomas Rice, and has been already fully stated. We think the testimony of a partnership was very strong. It could not, with propriety, have been withheld from the jury.

The question on which the plaintiff in error most relies, remains to be considered.

This suit is brought on a partnership transaction, against one of the partners. The declaration states a contract with the partner who is sued, and gives no notice that it was made by him with another. Will evidence of a joint *assumpsit* support such a declaration?

Although it has been held from the 36 H. 6. Ch. 38, that a suit against one of several joint obligors, might be sustained, unless the matter was pleaded in abatement; yet with respect to joint contracts, either in writing, or by parol, a different rule was formerly adopted; upon the ground of a supposed variance between the contract laid, and that which was proved. This distinction was overruled by Lord Mansfield, in the case of Rice *vs.* Shute, 5 *Burn*, 2611. The same point was after-

wards adjudged, in Abbott *vs.* Smith, 2 *W. Black.* 695; and has been ever since invariably maintained. The principle is, that a contract, made by copartners, is several, as well as joint, and the *assumpsit* is made by all, and by each. It is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action, the policy of the law does not permit him to avail himself of it, at the trial.

The course of decisions, since the case of Rice *vs.* Shute, has been so uniform, that the principle would have been considered as too well settled for controversy; had it not lately been questioned by a Judge, from whose opinions we ought not lightly to depart.

That Judge supposed, that if the defendant had no notice in the previous stage of the proceedings, which might inform him of the nature of the action, he was guilty of no negligence in failing to plead in abatement, and ought not to be deprived of his defence at the trial.

But the declaration never gives this notice, where the suit is brought against one, only, of the partners. He is always proceeded against, as if he were the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. The cases cited by Mr. Sergeant Williams, in note 4, on the case of Caleb *vs.* Vaughan, 1 *Saund.* 191, *n.* 4, shows conclusively, that the want of notice has never been considered, since Rice and Shute, as justifying this exception to the evidence at the trial.

We think there is no error, and the judgment is affirmed.

PETER DOX, GERRIT LA GRANGE, AND ISAIAH TOWNSEND, IMPLEADED WITH GERRIT L. DOX, PLAINTIFFS IN ERROR, *vs.* THE POSTMASTER-GENERAL OF THE UNITED STATES, DEFENDANT IN ERROR.

The Act of Congress, for regulating the Post-Office Department, does not, in terms, discharge the obligors, in the official bond of a Deputy Postmaster, from the direct claim of the United States upon them, on the failure of the Postmaster-General to commence a suit against the defaulting Postmaster, within the time prescribed by law. Their liability, therefore, continues. They remain the debtors of the United States. The responsibility of the Postmaster-General is superadded to, not substituted for, that of the obligors. {323}

The claim of the United States upon an official bond, and upon all parties thereto, is not released by the laches of the officer, to whom the assertion of this claim is intrusted by law. Such laches have no effect whatsoever, on the rights of the United States, as well against the sureties, as the principal in the bond. {325}

THIS case was brought up from the Circuit Court of the United States, for the Southern District of New-York, in the Second Circuit; upon a certificate of the Judges of that Court, that they disagreed on certain points, set forth in the certificate.

The cause was commenced in the District Court of the United States, for the Northern District of New-York, and removed by writ of error, to the Circuit Court.

The following were the points of disagreement:

1st. Whether the District Court had jurisdiction of the cause?

2d. Whether, by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the bond set forth in the record?

3d. Whether the said bond, from the facts so found or admitted by the pleadings, or appearing on the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged?

The original suit was commenced in the District Court, in August 1823, and the plaintiff declared in debt, on a bond, in the penal sum of six thousand dollars, executed on the 1st of January 1816, by Gerrit L. Dox, Peter Dox, Gerrit La Grange, and Isaiah Townsend; conditioned for the faithful performance of the duties of Postmaster, at Albany, by Gerrit L. Dox.

The declaration alleged two breaches of the condition of the bond.—

1. That said Gerrit L. Dox did not, at any time between the

first day of January 1816, and the first day of January 1817, (he being, during the whole of that time, Postmaster as aforesaid,) render any accounts of his receipts and expenditures, according to the condition of said bond; but utterly neglected so to do.

2. That after the date of said bond, and more than three months previous to the commencement of the suit, there came to the hands of said Gerrit L. Dox, as such Postmaster as aforesaid, the sum of six thousand dollars for postages, over and above commissions, &c., which he had not paid over to the Postmaster-General; but had refused so to do, although often requested, &c.

Gerrit L. Dox, the principal obligor, pleaded separately three pleas:—

1. *Non est factum*, and tendered an issue.

2. To the *first* breach, that he did render true accounts of his receipts and expenditures as such Postmaster, &c., and tendered an issue.

3. To the *second* breach, that he had paid to the Postmaster-General all the moneys he had received, over and above his commissions, &c., and tendered an issue.

Issues were joined on these pleas as tendered.

The defendants, Peter Dox, Gerrit La Grange, and Isaiah Townsend, the sureties of said Gerrit L. Dox, pleaded six pleas:—

1. *Non est factum*, and tendered an issue.

2. To the *first* breach, that Gerrit L. Dox did render true accounts of his receipts and expenditures, &c., and tendered an issue.

3. To the *second* breach, that the said Gerrit L. Dox had paid to the Postmaster-General all the moneys he had received over and above his commissions, &c., and tendered an issue.

4. To the *second* breach, that they executed the bond as sureties; that Gerrit L. Dox was removed from office on the first day of July, A. D. 1816; that the Postmaster-General, knowing there were sureties, did not open an account against Gerrit L. Dox, and make any claim and demand on him for the moneys received by him as Postmaster, until the first day of July, A. D. 1821; at which time, the Postmaster-General did open an account against, and claim and demand of said Gerrit L. Dox, the sum of 3041 dollars 35 cents; that Gerrit L. Dox, at the time of his removal from office, was solvent, and able to pay his debts, and continued so for three years, and until the first day of July 1819; and that after the first day of July 1819, and before the first day of July 1821, to wit, on the first day of January, A. D. 1820, he became insolvent, and still continues to be insolvent. This plea concluded with a verification.

(Dox et al. vs. The Postmaster-General.)

5. To the *second* breach, that they executed said bond as sureties for said Gerrit L. Dox; that said Gerrit L. Dox was removed from office on the first day of July, A. D. 1816; that the Postmaster-General, well knowing that they were sureties for Gerrit L. Dox, and that Gerrit L. Dox had neglected and refused to pay over to the Postmaster-General, the balance due from him at the end of every quarter while he was such Postmaster, did not commence a suit against said Gerrit L. Dox for his neglect and refusal to pay, until August, in the year 1821, at which time a suit was commenced against him and his sureties, on the bond in question; that Gerrit L. Dox was solvent at the time of his removal from office, viz: on the first day of July 1816, and continued so for three years, and until the first day of July, A. D. 1819; and that after the first day of July 1819, and before the first day of July 1821, viz: on the first day of January, A. D. 1820, he became insolvent, and still continues to be insolvent. This plea also concluded with a verification.

The plaintiff took issues on the first, second, and third pleas of the sureties, as they were tendered; and to the fourth, fifth, and sixth pleas, respectively, he replied, *that* said Gerrit L. Dox was not solvent at the time of his removal from office, nor did he continue to be solvent for the space of three years thereafter, or any part of said time; nor did he, on the first day of January 1820, or at any other time after the first day of July 1819, become insolvent; and thereupon issues were joined.

The issues were tried at the May session of the Court, in the year 1824. All the issues were found for the plaintiff, except those joined on the *fourth*, *fifth*, and *sixth* pleas of the sureties, which were found in favour of said sureties; *the breaches assigned, having been found to be true, as above stated, the damages on them were assessed at* 6000 *dollars.*

After the verdict, and at the same session of the Court, a motion was made on behalf of the said Postmaster-General, for judgment in his favour, notwithstanding the verdict against him, on said *fourth*, *fifth*, and *sixth* issues with the sureties, and judgment given for the said plaintiff.

The case was argued, on the part of the plaintiffs in error, by Mr. Samuel A. Foot, of New-York, and by Mr. Wirt, Attorney-General of the United States, for the Postmaster-General.

Mr. Foot.—

This suit was instituted to recover a balance due to the United States, by Gerrit L. Dox, as Postmaster, at Albany, in New-York. Gerrit L. Dox was appointed Postmaster, in January 1816, and was removed from office in July 1816. The breaches assigned were—1. Not rendering accounts as Postmaster.

2. Not paying over moneys he ought to have paid.

The issues upon all the pleas put in by Dox alone, and by him and his sureties together, were found for the plaintiff below; the only questions in the case, arise on the fourth, fifth, and sixth pleas, put in by the sureties only. The District Court held these pleas to be immaterial, and gave judgment for the Postmaster-General.

It is admitted, that since this suit was commenced, cases have been decided in this Court, which bear upon the question, whether the neglect of the officers of the government to proceed against a debtor to the public, will discharge the sureties. 9 *Wheat.* 720. The United States *vs.* Kirkpatrick. 11 *Ibid.* 184. The United States *vs.* Vanzant. 12 *Wheat.* 136. But the principles settled in these cases, are not entirely applicable to this. The law of the United States relative to the post-office establishment, makes it the duty of the Postmaster-General to file, every six months, in the Treasury Department, a transcript of the balances due from the Postmasters, and to sue for the same; and if he omits so to do, the balances are to be charged to the Postmaster-General, and to be collected from him. Thus the Postmaster-General becomes himself a debtor to the government, for the amount of the delinquency of every Postmaster; unless he has taken measures to collect the same; and he may use the name of the government for the purpose. This suit is therefore for the use of the Postmaster-General, as he had neglected to proceed against Gerrit L. Dox, for six years; and the sureties are entitled, against him, to the benefit of his laches. This case is different from those referred to; and the plaintiff, who had a verdict in his favour on the fourth, fifth, and sixth counts, is entitled to the presumptions, that the Postmaster-General was charged with the balances due by Gerrit L. Dox, and that he has paid the same to the United States. In the case of the Postmaster-General *vs.* Early, 12 *Wheat.* 136, the Court is understood to have said, that if this suit had been brought for the Postmaster-General only, the jurisdiction could not have been sustained. Here, the Postmaster-General is the only person beneficially interested. If the United States were the parties really interested, a special averment should have been made; and the general formal averment in the declaration, is not sufficient. The Postmaster-General is the *guarantee* of the debt to the United States; he could not be a witness in the case, and the suit should have been stated to be for his use; and then the jurisdiction would have been at an end.

2. Are the issues found for the plaintiff in error, material? If they are, the district Judge erred in giving judgment; if they are not, there should be a repleader. When the finding upon the issue does not determine the right, the Court ought

to award a repleader; unless it appears from the whole record, that by no manner of pleading, the matter in issue could have availed; 1 *Burr*, 381. The fourth, fifth, and sixth pleas, aver the solvency of the principal of the bond, for a considerable time, during which suit was not brought; and by these laches the sureties have become involved. It is not necessary to show, that the sureties applied to know what was the balance due to the United States. At Common Law, the question is, whether the case is such that the creditor might have been injured or have lost by it. The case of Law *vs.* The East India Company, has some application to the principles claimed in this case, 4 *Ves. jun.* 824.

The issues in the fourth, fifth, and sixth pleas, were material, as the solvency of Gerrit L. Dox was of the highest importance to the sureties.

Mr. Wirt, Attorney General, having, upon the authority of a private statement of the facts, made to him by the counsel of the plaintiffs in error, explained why the suit for a delinquency in 1816, was not instituted until 1823; thus vindicating the Postmaster-General from the imputation of laches; proceeded:

The case is a plain one, in favour of the Postmaster-General. All the material issues are found for him.—

1. That it was the bond of the obligees.
2. That the principal in the bond did not render an account.
3. That he did not pay over moneys received by him.

The District Court considered the fourth, fifth, and sixth pleas, immaterial, and gave judgment for the plaintiffs, *non obstante veredicto*. If these pleas were really immaterial, the judgment so given was correct. 2 *Archibold's Practice*, 229. 1 *Chitty's Pleadings*, 634.

If the Postmaster-General did not open an account with Gerrit L. Dox, the Postmaster, at Albany, or bring a suit according to law; would the sureties be absolved? This question has been already settled in this Court. The provisions of the law are directory to the Postmaster-General; but they create no contract with the deputy Postmaster, or his securities, that he shall open an account, and institute a suit, in case of delinquency. The case of the United States *vs.* Vanzant, 11 *Wheat.* 184, was one of great hardship; but the securities were held answerable upon the principles stated.

The finding of the jury on the second plea, establishes that no account was rendered by the Postmaster; and, therefore, the plaintiff below, had no materials to make out an account. The provisions relative to opening of accounts, have been held to be for the use of the United States, and for the direction of their officers, and with which others have nothing to do. Whe-

ther these provisions will be enforced, depends, and properly, on the discretion of the executive.

The question of jurisdiction should have been brought forward in the form of a plea. There is no averment, that the Postmaster-General was asserting this claim for himself.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This suit was instituted against Gerrit L. Dox, a deputy master, and against his sureties, on a bond given for the faithful performance of his duty. It was brought in the Court for the Northern District of New-York, and was removed, by writ of error, into the Circuit Court, sitting in the Southern District of New-York, composed of the Associate Justice of this Court, and the Judge of the Southern District. On the hearing, the Judges were divided in opinion upon three questions; which have been certified to this Court.—

1st. Whether the District Court had jurisdiction of the cause.

2d. Whether, by the facts appearing on the record, and admitted by the pleadings, or found by the jury, the sureties are exonerated, or discharged from their liability upon the bond so given by them, as set forth in the record.

3d. Whether the said bond, from the facts found, or admitted by the pleadings, as appearing by the record, can, in judgment of law, be considered as paid and satisfied, or otherwise discharged.—

1st. The question first to be considered, respects the jurisdiction of the Court. The difficulties which were believed to attend it, when this cause was adjourned, have been removed by the opinion of this Court, in the case of the Postmaster-General *vs.* Early. 12 *Wheat.* 136.

In that case, the question was fully considered, and deliberately decided. The time which intervened between the default of the officer, and the institution of the suit, exceeded the time prescribed by the Act of Congress in that case as well as this. Consequently, the circumstances of the two cases, are, in this respect, precisely the same. But the counsel for the Deputy-Postmaster says, that this point was not brought into the view of the Court, and has not been considered. The opinion of the Court, undoubtedly, did not take a view of the question, whether the Postmaster-General possessed such an interest in the cause, that it ceased to be a suit brought for the United States. This inquiry was not made in terms, but could not have escaped observation. The Act of Congress for regulating the post-office establishment, does not, in terms, discharge the obligors from the direct claim of the United States on them, on the failure of the Postmaster-General to commence a suit against the

defaulter, within the time it prescribes. Their liability therefore continues. They remain the debtors of the United States. The responsibility of the Postmaster-General himself, is superadded to, not substituted for, that of the obligors. The object of the Act, is to stimulate the Postmaster-General to a prompt and vigilant performance of his duty, by suspending over him a penalty, to which negligence will expose him; not to annul the obligation of his deputy. Had the object of the Act been to favour the sureties, its language would have indicated that intention. If this construction be correct, the obligors in this bond remain the debtors of the United States, and the superadded responsibility of the Postmaster-General, cannot affect the reasoning on which the jurisdiction of the Court was sustained, in the case of the Postmaster-General *vs.* Early.

The second question proposed for the consideration of the Court, is, whether, on the facts appearing in the record, the sureties are discharged from their obligations.

The breaches assigned, are—

1st. That Gerrit L. Dox failed to render accounts of his receipts and expenditures, as Deputy-Postmaster.

2d. That he had failed to pay over the moneys he had received, over and above his commissions, &c.

The defendant pleaded—1st. *Non est factum.* 2d. That Gerrit L. Dox did render true accounts, &c.; and 3d. That he did pay over the moneys he received. The issues joined on these pleas, were found for the plaintiff.

The question arises on other pleas, the issues on which were found for the defendants; and which state, in substance, that Gerrit L. Dox was removed from his office on the 1st day of July 1816: That the Postmaster-General did not open an account against him, and make any claim and demand on him for the moneys received by him, as Postmaster, until the 1st day of July 1821: That at the time of his removal from office, he was solvent and able to pay his debts, and continued so until the 1st day of July 1819, after which he became insolvent, and continues to be so. These pleas also state, that the Postmaster-General, well knowing that Gerrit L. Dox had neglected and refused to pay over the moneys due from him, as Postmaster, at the end of every quarter, &c., did not commence a suit until August 1821.

These facts, placed on the record without explanation, must be admitted to show a gross neglect of duty on the part of the Postmaster-General. Does this neglect discharge the sureties from their obligations?

The condition of the bond is broken, and the obligation has become absolute.

Is the claim of the United States upon them, released by the

laches of the officer, to whom the assertion of that claim was intrusted?

This question, also, has been settled in this Court.

The case of the United States *vs.* Kirkpatrick & others, 9 *Wheat.* 720, was a suit instituted on a bond, given by a collector of Direct taxes and Internal duties, under the Act of 22d July, 1813, ch. 16. The Act required each collector to transmit his accounts to the Treasury monthly; to pay over the moneys collected quarterly; and to complete his collection, pay over the moneys collected to the Treasury, and render his final account within six months from the day on which he shall have received the collection list from the principal assessor. In case of failure, the Act authorizes and requires the comptroller of the Treasury, immediately, to issue his warrant of distress against such delinquent collector, and his sureties. The comptroller did not issue his warrant of distress according to the mandate of the law; and this suit was instituted four years after such warrant ought to have been issued.

The Court left it to the jury to decide whether the government had not, by this omission, waived its resort to the sureties. A verdict was found for the defendants; the judgment on which was brought before this Court by writ of error.

The counsel for the defendant urged that laches might be imputed to the government, through the negligence of its officers; but this Court reversed the judgment, declaring the opinion that the charge of the Court below, which supposes that laches will discharge the bond, cannot be maintained in law. "The utmost vigilance," it was said, "would not save the public from the most serious losses, if the doctrine of laches can be applied to its transactions. It would, in effect, work a repeal of all its securities." It was further said, that the provisions of the law which require that settlements should be made at short and stated periods, are created by the government for its own security and protection; and to regulate the conduct of its own officers. They are merely directory to such officers, and constitute no part of the contract with the security. After a full discussion of the question, the Court laid down the principle, "that the mere laches of the public officers, constitutes no grounds of discharge in the present case." The same question came on to be again considered in the case of the United States *vs.* Vanzandt, 11 *Wheat.* 184.

This was an action of debt brought up on a paymaster's official bond, against one of the sureties. The act for organizing the general staff, and making further provision for the army of the United States, "makes it the duty of the paymaster to render his vouchers to the Paymaster General, for the settlement of his accounts;" and if he fail to do so, for more than six

months after he shall have received funds, the act imperatively enjoins "that he shall be recalled, and another appointed in his place." The paymaster had failed to comply with the requisites of the law; after which the Paymaster General instead of obeying its mandate, by removing him, placed further funds in his hands. The Circuit Court instructed the jury, that the defendant, the surety, was not chargeable for any failure of the paymaster to account for such additional funds, so placed in his hands after his said default and neglect in respect of the funds previously received were known; and a verdict was found for the defendant. The judgment on this verdict, was also brought before the Court by a writ of error, and was reversed.

The counsel for the defendant contended, that this case differed from the United States *vs.* Kirkpatrick and others; but the Court said "The provisions in both laws are merely directory to the officers, and intended for the security and protection of government, by ensuring punctuality and responsibility; but they form no part of the contract with the surety." The placing further funds in the hands of the defaulting paymaster, was considered as the necessary consequence of his continuance in office. This is certainly a very strong case. These two cases seem to fix the principle, that the laches of the officers of the government, however gross, do not of themselves discharge the sureties in an official bond, from the obligation it creates; as firmly as the decisions of this Court can fix it. We think they decide the question now under consideration.

The third question is, whether the bond can, upon the facts of the case, be considered in judgment of law, as paid and satisfied, or otherwise discharged. If this question was founded on the time which was permitted to elapse before the institution of the suit, the answer must be in the negative. The bond was executed on the 1st day of January 1816, the Postmaster was removed from office on the 1st day of July, in the same year; and this suit was instituted in August 1821. But little more than five years intervened, between the time when the sum due from the principal in the bond was ascertained, and the institution of the suit. The presumption of payment has never been supposed to arise from length of time in such a case, even between individuals; much less, in the case of the United States, where all payments are placed on that record which must be kept by the officers of government. An additional reason exists against the presumption in this case. Length of time, is evidence to be laid before the jury on the plea of payment. The pleas on which this presumption is supposed to arise, not only do not allege payment, but presuppose that payment has not been made, which failure they ascribe to

(Dox et al. vs. The Postmaster-General.)

the laches of the Postmaster-General. In such a case, there can be no ground for presuming payment and satisfaction.

That part of the question which is general, and which refers it to the Court to decide, whether the bond has been "otherwise discharged;" is understood to be a repetition of the second question, and to be answered in the answer given to that question.

This Court is of opinion, that it be certified to the Circuit Court of the United States, for the Southern district of New-York.—

1. That the District Court had jurisdiction of this cause.

2. That the sureties are not exonerated from their liability, upon the bond given by them, as set forth in the record.

3. That the said bond cannot be considered, in judgment of law, as paid and satisfied, or otherwise discharged.

This cause came on, &c., on consideration whereof, This Court is of opinion—1. That the District Court of the northern district of New-York, had jurisdiction of the said cause. 2. That the sureties to the bond on which the said suit was instituted, are not exonerated or discharged from their liability on the said bond, by the facts appearing on the record, and admitted by the pleadings, or found by the jury. 3. That the said bond cannot, from the facts found or admitted by the pleadings, or appearing by the record, be considered, in judgment of law, as paid and satisfied, or otherwise discharged. All which is directed to be certified to the Circuit Court of the United States for the southern district of New-York, in the second circuit.

JAMES ELLIOTT THE YOUNGER, BENJAMIN ELLIOTT, ANDERSON TAYLOR, REUBEN PATER, PATSEY ELLIOTT, AND WILFORD LEPELL, *vs.* THE LESSEE OF WILLIAM PEIRSOL, LYDIA PEIRSOL, ANN NORTH, JANE NORTH, SOPHIA NORTH, ELIZABETH F. P. NORTH, AND WILLIAM NORTH, DEFENDANTS IN ERROR.

A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter, had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, in a question of pedigree. {337}

The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted. {337}

In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter written, stating the pedigree of the claimants, was not considered as excluded, by the rule of law which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence. {337}

Where the defendant had reserved a right to move the Court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the Court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The Court is not bound to do more than respond to the motion, in the terms in which it is made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. {338}

The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony. {338}

In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes, must be pursued. {338}

By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed. {339}

The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid. {339}

It is the construction of the Act of 1810, that the clerks of the County

(Elliott et al. vs. Peirsol et al.)

Court of Kentucky, have authority to take acknowledgments and privy examinations of *femes coverts*, in all cases of deeds made by them and their husbands. {339}

What the law requires to be done, and appear of record, can only be done, and made to appear by the record itself, or an exemplification of it. It is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*. {340}

A deed from *Baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a re-conveyance to the husband, and thus to vest in him the estate of the wife; was endorsed by the clerk of Woodford County Court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th 1816," and was certified as follows:—"Attest, J. M'Kenney, Jun. *Clerk.*"

"*Woodford County, ss.* *September 11th* 1813.

"This deed from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

John M'Kenney, Jun. C. C. C."

Held, that subsequent proceedings of the Court of Woodford County, by which the defects of the certificate of the clerk to state the privy examination of the *feme*, (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal,) were intended to be cured upon evidence that the privy examination was made by the clerk, will not supply the defect, or give validity to the deed. {340}

If the Court of a state had jurisdiction of a matter, its decision would be conclusive; but this Court cannot yield assent to the proposition, that the jurisdiction of a state Court cannot be questioned, where its proceedings were brought, collaterally, before the Circuit Court of the United States. {340}

Where a Court has jurisdiction, it has a right to decide any question which occurs in the cause; and, whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification; and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers. {340}

The jurisdiction of any Court, exercising authority over a subject, may be inquired into in every other Court, when the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings. {340}

The jurisdiction and authority of the Courts of Kentucky, are derived wholly from the statute law of the state. {341}

The clerk of Woodford County Court, has no authority to alter the record of the acknowledgment of a deed, at any time after the record is made. {341}

WRIT of error to the Circuit Court of Kentucky.

William Peirsol, and Lydia Peirsol, his wife, Ann North, Jane North, Sophia North, Elizabeth F. P. North, and Wil-

liam North, citizens of Pennsylvania, heirs of Sarah G. Elliott, commenced their action of ejectment against James Elliott the younger, and others, the plaintiffs in error, in the Circuit Court for the district of Kentucky, to recover the possession of 1200 acres of land, part of 2000 acres patented to Griffin Peart.

The plaintiffs proved, that, upon the division of the whole body among the heirs of Griffin Peart, the 1200 acres in contest was allotted to Sarah G. Peart, one of the heirs, and that she was seised thereof in severalty. Sarah G. Elliott, formerly Peart, she having intermarried with James Elliott, died about 1822, without issue; Francis Peart, and Le Roy Peart, brothers of Sarah Elliott, died shortly before her, also without issue. The boundaries of the 1200 acres, and the possession by the defendants, was not controverted.

The plaintiffs below, claimed the premises, as the heirs of Sarah G. Elliott, formerly Sarah G. Peart; and they sought to establish their heirship by the deposition of Mrs. Braugh, widow of Robert Braugh; who swears, that the letter annexed to her deposition, addressed to William Peirsol, Philadelphia, is in the handwriting of her deceased husband. She also states, that she frequently heard him speak of his family connexions, and has always understood from him, that the late Mrs. Mary North, formerly Mary Peart, and the late Mrs. S. G. Elliott, were cousins, both on the side of the father and mother; and that the statements in the letter, correspond with the other statements she heard him make upon the subject of the pedigree of the two ladies; which letter, proves the present plaintiffs to be the only heirs of Mrs. Sarah G. Elliott, at the time of her death. Other depositions were read to the same effect.

On the 12th of June 1813, James Elliott, and Sarah G. Elliott, executed a deed, by which the premises in question were expressed to be conveyed to Benjamin Elliott, under whom the plaintiffs in error claimed to hold the same.

The defendants below, moved the Circuit Court to instruct the jury, that the evidence adduced by the plaintiffs to establish their heirship to Sarah G. Elliott, was *insufficient*, and that the same ought to be excluded. The Court refused so to do; but, on the contrary, instructed the jury, that the said evidence, if believed by the jury, was *prima facie* testimony, that the lessors of the plaintiffs were the legal heirs of the said Sarah Peart, *alias*, Sarah G. Elliott.

In relation to the deed of 12th June 1813, to Benjamin Elliott, it was contended below, that Sarah G. Elliott never did execute the same, in the manner described and required by law, and that the fee simple estate of Mrs. Elliott, did not pass thereby. The provisions of the law relative to the privy exa-

mination of a *feme covert*, by the officer, the clerk of the Court, or in open Court, and to the recording thereof, were alleged not to have been complied with; and consequently, the estate of Mrs. Elliott did not pass, by the conveyance, to Benjamin Elliott. It was also claimed, on the part of the plaintiffs in error, that if a privy examination and acknowledgment were made, it was not recorded; and unless recorded, no title passes to divest the title of the *feme covert*. The Circuit Court decided this point in favour of the defendants in error; and the case was brought up, upon a bill of exceptions.

Mr. Wirt, Attorney General, for the plaintiffs in error.

1. The letter of Mrs. Ann Braugh to William Peirsol, is not evidence. Although the declarations of members of families are evidence in questions of *pedigree*, yet this rule is not universal, and it does not apply, when higher evidence can be obtained. 3 *Stark. Evid.* 1099. 1011. 3 *Marshall*, 321.

The letter was written with a view to, or under the influence of, the approach of this suit; *post litem motam*, and such evidence is not admissible. 3 *Starkie*, 1102. 1104.

2. As to the admissibility of the deed to Benjamin Elliott, and the alleged defect of the acknowledgment of the *feme covert*, Sarah G. Elliott.

1. The Circuit Court of the United States was not competent to inquire into the acts of the Court of the state of Kentucky; before which the proceedings relative to the acknowledgment were entertained. This is not done by the Courts of King's Bench, of England, in reference to the proceedings of Ecclesiastical Courts, or Courts of Common Pleas. The Circuit Court could look at nothing but the record from the State Court, and could not inquire in what mode the certificate had been made. But, if this could be done, there were materials enough for the purpose.

The examination of the *feme*, was made according to the provisions of the law, but it was not at the time fully stated by the clerk so to have been made. He took the ackowledgment, and the Court, subsequently, did no more than fill up the record of what had been actually done, from the testimony of the facts before them. This was done by virtue of the powers which Courts have exercised, to correct their records at a subsequent period. 4 *Mad.* 371. 12 *Mad.* 384. 2 *Stark.* 1132. 1156. 1182. 3 *Bulst.* 114. 8 *Coke*, 162. *Palmer*, 509. *Rolle's Rep.* 272. 2 *Saund.* 289. *Raymond*, 39. 209. *Sidf.* 70. *Salkeld*, 50. *P. L.* 13. *ibid.* 50. *Ld. Ray.* 695. *Cr. Eliz.* 435. 459. 677. 2 *Rolls Rep.* 471. *Hob.* 327. *Rolle's Abridg.* 209, 210. 2 *Jones*, 212. *Gwl. Bacon*, 197, *note*. *Pigot's Recov.* 218. *Douglass*, 134, 1 *H. Blk.* 238. *Barnes*, 216. 2 *N. York T. R.* 139. 4 *Hen. & Mum.* 498. 3 *Call.* 221. 233. 3 *Hen. & Mum.* 449.

(Elliott et al. vs. Peirsol et al.)

2. The clerk of the Court, who took the acknowledgment, acted as the ministerial agent of the Court, and he acts as if he was in Court. This act was, therefore, in the power of the Court. But if the clerk had the powers of a Court in reference to taking acknowledgments of deeds, the authorities cited, showing the rights of Courts to correct errors, apply to his acts; and if such were his powers, the interference of the Court, in this case, was surplusage.

Mr. Wickliffe, for the defendants in error.—

1. The assumption of the power to correct his errors by the clerk of the Court, was a nullity in Kentucky, according to the established laws and decisions there. *Hard. Rep.* 171, 172. The laws of Kentucky, relative to taking acknowledgments of deeds, have undergone many modifications; but the law and practice now is, for the clerks to take the acknowledgment and the privy examination of a *feme covert*; and in this they act independent of the Courts, and not under their authority; nor have the Judges of the Courts any power to interfere with their acts or proceedings, in relation to such acknowledgment.* The authorities cited to show the right and practice of

* By the kindness of Mr. Wickliffe, the Reporter has been furnished with the following abstract of the present laws of Kentucky, relative to the execution of conveyances by non-residents, and by husband and wife; Laws of Kentucky, chap. 278, 1796.

If the party who shall sign and seal any such writing, reside not in this commonwealth, the acknowledgment by such party, or the proof by the number of witnesses requisite †, of the sealing and delivering of the writting before any Court of law, or the mayor, or other chief magistrate of any city, town, or corporation of the county in which the party shall dwell, certified by such Court, or mayor, or chief magistrate, in the manner such acts are usually authenticated by them, and offered to the proper Court, to be recorded within eight months after the sealing and delivering, shall be as effectual, as if it had been in the last mentioned Court.

Conveyances by husband and wife, how to be executed, &c.

Sec. 4. When husband and wife shall have sealed and delivered a writing, purporting to be a conveyance of any estate or interest, if she appear in Court, and being examined privily, and apart from her husband, by one of the justices thereof, shall declare to him that she did freely and willingly seal and deliver the said writing, "to be then shown and explained to her," and wishes not to retract it, and shall, before the said Court, acknowledge the said writing, again shown to her, to be her act; or if before two justices of the peace of that county in which she dwelleth, if her dwelling be in the United States of America, who may be empowered by commission, to be issued by the clerk of the Court wherein the writing ought to be recorded, to examine her privily, and take her acknowledgment: the wife being examined privily, and apart from her husband, by those commissioners, shall declare that she willingly signed and sealed the said writing, "to be then shown and explained to her by them," and consenteth that it may be recorded; and the said commissioners shall return with the said commission, and thereunto annexed, a certificate under their hands and seals, of such

† Three witnesses—by a previous section of the law.

Courts to correct errors or omissions, do not apply. As to the laws of Kentucky, relative to this subject, there was cited the Act of Assembly of 1795. 1 *Littel*, 595. The Circuit Court did not, in this case, inquire how the acts or proceedings of the Court of Kentucky had been performed, but whether the laws of the state, on the subject matter, had been complied with.

2. The facts of the case, as stated in the record, show that the testimony of Mrs. Ann Braugh was not liable to the objection that it was given *post litem motam*; as to the operation of evidence, *post litem mortem*, he cited, *Cowper*, 594. 14 *East*, 331. 3 *Starkie*, 1105.

Mr. Justice TRIMBLE delivered the opinion of the Court.—

This is an action of ejectment, brought in the Circuit Court for the district of Kentucky, by the lessors of the defendant in error, and against the plaintiffs in error, who were defendants in the Court below.

The lessors of the plaintiff, in that Court, claimed the land in controversy, as heirs at law of Sarah G. Elliott, formerly Sarah G. Peart, deceased; who, in her lifetime, had intermarried with the defendant, James Elliott. The defendants claimed by virtue of a deed of conveyance, made by James Elliott and Sarah G. Elliott his wife, in her lifetime, to Benjamin Elliott, and a deed reconveying the land from Benjamin Elliott to James Elliott.

On the trial of the general issue between the parties, the defendants took a bill of exceptions to certain opinions of the Court, in overruling motions made by the defendants for instructions, &c., and in granting instructions to the jury, moved by the

privy examination by them, and of such declaration made, and consent yielded by her; in either case, the said writing acknowledged, also, by the husband, or proved by witnesses, to be his act, and recorded, together with such privy examination and acknowledgment before the Court, or together with such commission and certificate, shall not only be sufficient to convey or release any right of dower, thereby intended to be conveyed or released, but be as effectual for every other purpose, as if she were an unmarried woman.

If out of the United States.

Sec. 5. If the dwelling of the wife be not in the United States of America, the commission to examine her privily, and take her acknowledgment, shall be directed to any two judges or justices of the peace of any Court of law, or to the mayor, or other chief magistrate of any city, town, or corporation, of the county in which the said wife shall dwell, and may be executed by them in the same manner as a commission directed to two justices in the United States of America; and the certificate of the judges or justices of such Court, or the certificate of such mayor, or chief magistrate, authenticated in the form, and with the solemnity by them used in other acts, shall be as effectual as the like certificate of the justices in the United States of America.

plaintiff, in the progress of the trial; and, a verdict and judgment having been rendered against the defendants, they have brought the case before this Court by writ of error.

The bill of exceptions states, "that upon the trial of this case, the plaintiffs read as evidence, a patent from the commonwealth to Griffin Peart, dated the 1st of May 1781, covering the land in controversy, (which patent is made part of the bill of exceptions,) and sundry depositions, taken and filed in the cause, (also made part of the bill of exceptions;) and proved that, upon a division of the land granted to Griffin Peart, by said patent, the part in contest was allotted to the late Sarah G. Elliott, formerly Sarah G. Peart, and that she was seised thereof in severalty: that the said Sarah G. Elliott died, before the institution of this suit, about the year 1822, without issue; and that the defendants were in possession of the land, allotted to her as aforesaid. And after the plaintiffs had closed their evidence, touching their derivation of title, the defendants, as they had reserved the right to do, moved the Court to instruct the jury, that the evidence adduced on the part of the plaintiffs, was insufficient to prove title in the lessors of the plaintiffs, and that the same ought to be rejected; but the Court refused so to instruct, or to exclude the evidence; and, on the contrary, instructed the jury that the said evidence, if believed by them, was *prima facie* evidence, that the lessors were the legal heirs of the patentee, Griffin Peart, &c. To which opinion of the Court, in all its parts, the defendants except.

The defendants then gave in evidence, the deed of conveyance from Sarah G. Elliott and her husband, to Benjamin Elliott, (dated the 12th day of June 1813,) for the land in contest, and the deed from Benjamin Elliott, to the said James, together with all the endorsements upon, and authentications annexed to the first mentioned deed; which endorsements and authentications are in the following words and figures, to wit:—"Acknowledged by James Elliott & Sarah G. Elliott. September 11th, 1813.

Attest—J. M'KINNEY, JR. Clerk."

"*Woodford County, sct.* *September 11th*, 1813.

This deed, from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded.

JOHN M'KINNEY, JR. C. W. C. C."

"*Woodford County, sct.* *November County Court*, 1823.

"On motion of Benjamin Elliott, by his attorney, and it appearing to the satisfaction of the Court, by the endorsement on the deed from James Elliott and wife, to him, under date of 12th June 1813, and by parol proof, that said deed was acknow-

ledged in due form of law by Sarah G. Elliott, before the clerk of this Court, on the 11th of September 1813; but that the certificate thereof was defectively made out: It is ordered, that the said certificate be amended to conform to the provisions of the law in such cases, and that said deed and certificate, as amended, be again recorded. Whereupon said certificate was directed to be amended, so as to read as follows, to wit:—

"*Woodford County, sct.* *September 11th*, 1813.

This day, the within named James Elliott, and Sarah G. Elliott his wife, appeared before me, the clerk of the Court of the county aforesaid, and acknowledged the within indenture, to be their act and deed: and the said Sarah being first examined, privily and apart from her husband, did declare, that she freely and willingly sealed the said writing, which was then shown and explained to her by me, and wished not to retract it, but consented that it should be recorded. The said deed, order of Court, and certificate, as directed to be amended, are all duly recorded in my office.

Attest—JOHN M'KINNEY, JR. C. W. C. C."

It was proved by John M'Kinney, a witness examined on the part of the defendants, that the endorsement made on the back of the deed, from Elliott and wife, to Benjamin Elliott, in these words, to wit:—"Acknowledged by James Elliott and Sarah G. Elliott. September 11th, 1813.

Attest—J. M'KINNEY, Clerk;"

Was in the hand writing of the said clerk of the Woodford County Court, and was the minute made by him, at the time said deed was acknowledged; and it was also proved, that the certificate of the acknowledgment and recording of the said deed, endorsed on said deed, was, at some subsequent time, written and drawn out by a deputy of said clerk, from the said minute. And the clerk deposed, that although he had not a particular recollection of all the facts, that he remembered the circumstance of James Elliott and his wife coming to his office to acknowledge said deed: that he knew what his duty required in such cases, and that the acknowledgment and privy examination, and an explanation of the instrument to her, was requisite, in order to its being recorded as to her. And that he did not doubt he had done his duty in this instance, and that said deed had been acknowledged by Mrs. Elliott, in all respects. Other parol evidence was given, conducing to prove, that, in point of fact, the said deed from Elliott and his wife, was regularly acknowledged by the wife before the clerk, upon his privy examination of her.

The said M'Kinney, upon cross-examination, further proved, that after the said deed and certificate of the acknowledgment

thereof, had been recorded, and in the lifetime of Mrs. Elliott; he had, at the instance of her counsel, made out a true copy of the record of said deed, and certificate of the acknowledgment thereof, by Elliott and wife, as they were then upon the record; which copy, the plaintiff gave in evidence: that after the death of Mrs. Elliott, application was made to him, by the counsel of the defendants, to alter the certificate of the acknowledgment of the deed from Elliott and wife, to Benjamin Elliott, so as to state her privy examination; but which he declined. It was also proved, that the deed had remained in the possession of the clerk, from the time of its first acknowledgment, till after the certificate ordered by the County Court, was made upon it.

After the defendants had closed the evidence on their side, which was as above stated; the Court, upon the motion of the plaintiffs' counsel, instructed the jury, that the parol evidence which had been given on the part of the defendants, conducing to show a privy examination of Mrs. Elliott, was incompetent for that purpose: that a privy examination and acknowledgment of a *feme covert*, so as to pass or convey her estate, could not, legally, be proved by parol testimony, but by record; and that although they might believe, from the parol evidence, that said deed had been acknowledged by Mrs. Elliott, in all due form of law, upon her privy examination, and all proper explanations given to her; yet, it constituted no defence to the action, unless such privy examination had been duly certified and recorded.

The Court further instructed the jury, that the certificate of the acknowledgment of said deed, by Elliott and wife; and the after certificate, by order of the County Court, of her privy examination; were not sufficient, in law, to pass her estate; because, the first shows no privy examination, and the County Court had no jurisdiction to order the second to be made. To all which opinions, and decision of the Court, the defendants except, &c.

It is argued, by the learned counsel in this Court, that the motion of the defendants to exclude the evidence adduced on the part of the plaintiffs, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff, ought to have been granted. The argument in this Court has not put the question on the ground, that taking the whole of the plaintiff's evidence together, touching the derivation of the title of the lessors of the plaintiff, it is insufficient to deduce the title to them down from the patentee, though Sarah S. Elliott, who was seised thereof in severalty.

We have however reviewed the evidence, with a view to that question, and are satisfied it is sufficient for that purpose.

The ground of argument relied on here, is, that a part of the

evidence was incompetent and inadmissible. It is said, that so much of the depositions as detail Mrs. Elliott's conversations, concerning the manner of her acknowledgment of the deed, and so much of Mrs. Braugh's deposition, as speaks of the letter of her deceased husband, and the letter itself, made part of her deposition were incompetent, and ought to have been rejected; and that the reservation of the right to move to reject the evidence, admitted in the bill of exceptions, shows that the defendants' counsel, had the right to insist upon the rejection of any part of the evidence, as incompetent. The argument admits of several answers deemed satisfactory. Mrs. Elliott's conversation, detailed in some of the depositions, in relation to the defendant's deed, can by no fair construction be brought within the motion. It related not to the title of the lessors of the plaintiff, but to supposed defects in the title of the defendants: and to use the language of the bill of exceptions, it was the plaintiff's evidence "touching the derivation of the title of the lessors of the plaintiff," which the defendants moved to exclude. Besides, at that stage of the case, the defendants had not introduced the deed; and when we come to consider the defendants' title, after the deed was introduced, it will appear, that Mrs. Elliott's declarations could in no manner have influenced the verdict, and were therefore harmless. We are not prepared to admit, that Mrs. Braugh's letter, on the subject of the family pedigree, proved by her evidence, and made part of her deposition, was not competent evidence to be left to the jury upon a question of pedigree or heirship. She was an aged member of the family, and traces back the pedigree, and several branches of the family, for about seventy years.

The rule of evidence, that in questions of pedigree the declarations of aged and deceased members of the family may be proved, and given in evidence, has not been controverted. But it is argued, that this rule is qualified by this exception—that declarations, made *post litem motam*, cannot be given in evidence; and it is insisted this case comes within the exception; for although no suit had been commenced, yet a controversy had arisen, or was expected to arise.

We doubt the application of the exception to this case. A controversy had arisen, or was expected to arise, between the heirs of Mrs. Elliott, and the defendants, concerning the validity of the deed of Mrs. Elliott, made while she was a *feme covert*. But it does not appear, that any controversy had arisen, or was expected to arise, about who were her heirs. The *lis mota*, if it existed, was not, who were heirs, but, whether Mrs. Elliott's deed made a good title against the heirs, whoever they might be. It is not necessary, however, to give any

positive opinion on this point, as other grounds exist upon which the motion was rightfully overruled.

It is conceded that the defendants' counsel had a right to move the Court below to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent; but it is not admitted that he exercised that right. It does not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence, as objectionable, and moved the Court to exclude it. But on the contrary, resting his case upon the assumption, that the whole evidence of the plaintiffs, taken together, was either incompetent, or insufficient, he moved the Court either to exclude the whole, or to instruct the jury that the whole was insufficient to prove title in the lessors of the plaintiff. This could not be done, on the ground of incompetency, unless the whole was incompetent, which is not pretended; the Court was not bound to do more, than respond to the motion, in the terms in which it was made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. We have already said, the evidence, taken all together, was sufficient to prove title in the lessors of the plaintiff. If any part of it was incomplete, the Court might, on a general motion to exclude the whole, have excluded such parts; but the Court was not obliged to do so. There is therefore no error in the decision of the Circuit Court, overruling the motion of the defendants; nor in the instructions given to the jury, upon that motion.

We now proceed to an examination of the questions arising out of the instructions given to the jury, on the motion of the plaintiffs, in relation to the deed of James Elliott and Sarah G. Elliott his wife, to Benjamin Elliott; set up by the defendants in their defence.

The general question involved in the first instruction, is, can the privy examination, and acknowledgment of a deed, by a *feme covert* so as to pass or convey her estate, be legally proved by parol testimony? We hold that they cannot.

By the principles of the common law, a married woman can, in general, do no act to bind her; she is said to be *sub potestate viri*, and subject to his will and control. Her acts are not like those of infants, and some other disabled persons, voidable only; but are, in general, absolutely *void ab initio*.

In Virginia and Kentucky, the solemn modes of conveyance by fine and common recovery, have never been in common use; and in those states, the capacity of a *feme covert* to convey her estate by deed, is the creature of statute law; and to make her deed effectual, the forms and solemnities, prescribed by the statutes, must be pursued.

(Elliott et al. vs. Peirsol et al.)

The Virginia statute of 1748, ch. 1st, after making provisions to enable *femes coverts* to convey their estates by deed, upon acknowledgment and privy examination, according to prescribed forms; in the 7th section, has these words—"Whereas, it has always been adjudged, that where any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." The 8th section enacts and declares, "That the law herein, shall always be held according to the said judgments, and shall never hereafter be questioned, &c."

This law was adopted by Kentucky at her separation from Virginia, and is understood never to have been repealed.

The 4th section of the Kentucky statute of 1796, (see 1 *Litt. Laws, p.* 569,) provides for the privy examination and acknowledgment of *femes covert* in open Court, and where they cannot conveniently attend; authorizes a commission to issue to two justices to take and certify the acknowledgment and privy examination; and declares, that "In either case, the said writing acknowledged by the husband, and proved by witnesses to be his act, and recorded, *together* with such privy examination and acknowledgment, &c., shall not only be sufficient to convey or release any right of dower, &c., but be as effectual for every other purpose, as if she were an unmarried woman."

The 1st section of this Act, authorizes clerks of the County Courts, General Court, and Court of Appeals, to take, in their offices, the acknowledgment or proof of the execution of deeds, and to record them, upon acknowledgments or proofs, so taken by themselves; but did not authorize them to take the acknowledgment and privy examination of *femes coverts.*

But, by a subsequent statute, clerks are authorized to take, in their offices, the "acknowledgment of all deeds, according to law." And the Act of 1810, (4 *Litt. Ky. Laws*, 165,) which authorizes the clerk of one county to take and certify the acknowledgment of a deed to be recorded by the clerk of another county where the land lies, &c., declares, that "if the due acknowledgment, or privy examination of the wife, &c., shall have been taken, &c. by the clerk receiving the acknowledgment of the deed, &c., and that being duly certified with the deed, and *recorded*, shall transfer such wife's estate, &c." as fully, as if the examination had been made by the Court, or the clerk in whose office the deed shall be recorded.

It is by construction of these last recited laws, that the clerks are held, in Kentucky, to be authorized to take the acknowledgments and privy examinations of *femes coverts*, in all cases of deeds made by them and their husbands.

The Kentucky statutes, above recited, show clearly, that the legislature of that state has never lost sight of the principle de-

clared by the Virginia statute of 1748: "That when any deed has been acknowledged, by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs."

What the law requires to be done, and appear of record, can only be done and made to appear by the record itself, or an exemplification of the record. It is perfectly immaterial whether there be an acknowledgment, or privy examination in fact or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination merely, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*.

It is now only necessary to state the second instruction given to the jury on the plaintiffs' motion, to manifest its entire correctness. It was, "that the first certificate of the acknowledgment and recording of the deed of Elliott and wife, was not sufficient in law to pass her estate; because, it showed no privy examination of the *feme*."

The last instruction given by the Court to the jury presents a question of more difficulty. It is, "that the after certificate, made by order of the County Court, of her privy examination, is insufficient, in law, to pass her estate; because the County Court had no jurisdiction or authority to order the said second certificate to be made."

It is argued, that the Circuit Court of the United States had no authority to question the jurisdiction of the County Court of Woodford county; and that its procedings were conclusive upon the matter, whether erroneous or not.

We agree, that if the County Court had jurisdiction, its decision would be conclusive. But we cannot yield an assent to the proposition, that the jurisdiction of the County Court could not be questioned, when its proceedings were brought, collaterally, before the Circuit Court. We know nothing in the organization of the Circuit Courts of the Union, which can contradistinguish them from other Courts, in this respect.

Where a Court has jurisdiction, it has a right to decide every question which occurs in the cause; and whether its decision be correct or otherwise, its judgment, until reversed, is regarded as binding in every other Court. But, if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a recovery sought, even prior to a reversal, in opposition to them. They constitute no justification; and all persons concerned in executing such judgments or sentences, are considered, in law, as trespassers.

This distinction runs through all the cases on the subject; and it proves, that the jurisdiction of any Court exercising au-

thority over a subject, may be inquired into in every Court, when the proceedings of the former are relied on and brought before the latter by the party claiming the benefit of such proceedings.

It is well known that the jurisdiction and authority of the County Courts of Kentucky are derived wholly, from the statute law of the state. In argument, we were referred to no statute which was supposed, either in terms, or by fair construction, to confer upon the County Court any supervising or controlling power over the acts of the clerk, in taking, in his office, the acknowledgment of a deed, or in recording it, upon an acknowledgment there taken by him. We have sought in vain for such a provision, and it is believed none such exists. No such supervising and controlling power can result to the Court, from the general relations which exist between a Court and its clerk; for in this case, the statutes confer upon the clerk, in his office, a distinct, independent, personal authority, to be exercised by him upon his own judgment and responsibility. We think, therefore, with the Circuit Court that the County Court had no jurisdiction or authority to order the after certificate of Mrs. Elliott's privy examination to be made and recorded.

But the argument, which seemed to be relied on most confidently by the learned counsel, is, that the order of the County Court may be disregarded; and the amendment considered as an amendment made by the clerk, of his own authority, and that the clerk was authorized to amend his own certificate, and record, at any time.

It would be difficult to maintain that the second certificate, or amendment as it is called, could rightfully be regarded as the clerk's own act, independent of the order of the County Court; it appearing that he refused to do the act until the order was made. But be it so.

Had the clerk authority to alter the record of his certificate of the acknowledgment of the deed, at any time after the record was made? We are of opinion he had not.

We are of opinion he acted ministerially, and not judicially, in the matter. Until his certificate of the acknowledgment of Elliott and wife was recorded, it was, in its nature, but an act *in pais*, and alterable at the pleasure of the officer. But the authority of the clerk to make and record a certificate of the acknowledgment of the deed, was *functus officio*, as soon as the record was made. By the exertion of his authority, the authority itself became exhausted. The act had become matter of record, fixed, permanent, and unalterable; and the remaining powers and duty of the clerk were only to keep, and preserve the record safely.

If a clerk may, after a deed, together with the acknowledg-

ment or probate thereof have been committed to record, under colour of amendment, add any thing to the record of the acknowledgment, we can see no just reason why he may not also subtract from it.

The doctrine that a clerk may, at any time, without limitation alter the record of the acknowledgment of a deed, made in his office, would be, in practice, of very dangerous consequence to the land titles of the county, and cannot receive the sanction of this Court.

It is the opinion of this Court, that there is no error in the judgment and proceedings of the Circuit Court, and the same are affirmed, with costs.

LESSEE OF THOMAS SPRATT, ANDREW, WILLIAM, SARAH, JACOB, CATHARINE, AND PIERCE SPRATT, PLAINTIFFS IN ERROR, *vs.* SARAH SPRATT, DEFENDANT IN ERROR.

The Act of the legislature of Maryland, passed 19th December, 1791, entitled "An Act concerning the territory of Columbia, and the City of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen. {349}

A foreigner who becomes a citizen, is no longer a foreigner, within the view of the Act. Thus *after purchased lands*, vest in him as a citizen, not by virtue of the Act of the legislature of Maryland, but because of his acquiring the rights of citizenship. {349}

Land in the county of Washington, and District of Columbia, purchased by a foreigner, before naturalization, was held by him under the law of Maryland, and might be transmitted to the relations of the purchasers, who were foreigners; and the capacity so to transmit those lands, is given absolutely, by this Act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner. {349}

ERROR to the Circuit Court of the District of Columbia, for the county of Washington.

This was an action of ejectment, brought by the plaintiff in error to recover several messuages, which he claimed by virtue of several demises made to him by Thomas Spratt, and others; the messuages all lying and being in the county of Washington, in the District of Columbia; against Sarah Spratt, the defendant in error, who was the widow of James Spratt, and who was in possession of the premises.

The following facts were agreed in the Court below:

James Spratt, before the time of the demise laid in the plaintiff's declaration, died seised in fee simple, of the premises, mentioned in the said declaration; that the lessors of the plaintiff are the legitimate brothers and sisters of the whole blood of the said James Spratt; and that the defendant was the lawful wife of said James Spratt, at the time of his death, and, as his widow, is still living.* Also, that the lessors of the plaintiff made a peaceable entry into the said premises, and executed to the plaintiff the lease mentioned in the said

* The Act of Assembly of Maryland, No. 1786, ch. 45, entitled "An Act to direct descents," provides; "If there be no descendants or kindred of the intestate to take the estate, then the same shall go to the husband or wife, as the case may be."

declaration upon the premises, and that the plaintiff, being in possession of said premises by virtue of that lease, was therefore ousted by the defendant. That the said James Spratt, and the defendant his wife, were natives of Ireland, of the United Kingdom of Great Britain and Ireland, and came to the United States of America in the year eighteen hundred and twelve, and before the eighteenth day of June, in that year; and continued to reside therein, and to cohabit as man and wife, to the time of his death; which took place on the fourth day of March, eighteen hundred and twenty-four. That the said James Spratt, on the eleventh day of October, in the year 1821, was duly admitted, and naturalized as a citizen of the United States, in the Circuit Court of the District of Columbia, and received a certificate of such naturalization in due form, according to the directions and conditions of the several Acts of Congress, in such case provided; the said defendant then and there being his lawful wife, and as such, cohabiting with him as aforesaid. That the defendant, Sarah Spratt, did not, in her own person, comply with any of the directions or conditions required by the said Acts of Congress, or any of them, or become in any manner admitted or naturalized as a citizen of the United States, otherwise than by the admission and naturalization of her said husband. That the lessors of the plaintiff are all natives of Ireland, and native born subjects of the King of the United Kingdom of Great Britain and Ireland; that only two of them, to wit, Thomas Spratt, and Pierce Spratt, ever came to the United States; both of whom came to the United States, and resided therein some years before the death of James Spratt, and that none of them were admitted or naturalized citizens of the United States. That James Spratt was not in any manner seised of, or entitled to any of the messuages or tenements, in the declaration mentioned, at any time before his said naturalization, except of the lot No. in Square, which was duly bargained, sold, and conveyed, by one Isaac S. Middleton, to the said James Spratt, in fee simple, on the 11th day of January, 1821; and that all the rest and residue of the said messuages and tenements were purchased by the said James Spratt, and to him duly bargained, sold and conveyed, in fee simple, at various times in the year 1822 and 1823, after his said naturalization.

Upon this statement of facts, the question of law which arose was as to the true construction of a statute of the state of Maryland, entitled "An Act concerning the territory of Columbia, and the City of Washington," passed the 19th of December, 1791; by the 6th section of which it is provided as follows, to wit: "That any foreigner may, by deed or will to be hereafter made, take and hold lands within that part of the

said territory which lies within this state, in the same manner as if he was a citizen of this state; and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this state: Provided, that no foreigner shall, in virtue hereof, be entitled to any further or other privilege of a citizen."

It was contended, on the part of the plaintiff, that, according to the true construction of that statute, his lessors, who were the *heirs and relations of the deceased*, James Spratt, inherited all the lands and tenements of which he died seised in fee; and that the circumstance of James Spratt, who was a *foreigner*, having been *naturalized* before his death, could not alter the state of their right of inheritance, whether the lands were acquired before or after his act of naturalization.

Mr. Cox, for the plaintiff in error.

The term "*foreigner*," used in the law of Maryland, is not a technical word, nor has it received a technical definition; and in this respect, it differs from "*alien*." Its true signification must therefore be ascertained by its use, and by a reference to the statute by which it is introduced.

It is probably derived from the Latin, *foris*, and *origo*, the Spanish, *foranio*, or the French, *forain;* and always refers to birth or origin. Alien is obtained from the Latin, *alienus*, and always refers to the *present time*. One may cease to be an *alien*, but can never cease to be a foreigner.

In this sense it is employed in various Acts of Congress, in the most precise and formal writings, and in ordinary parlance. This is the proper mode of ascertaining its meaning. 6 *Bacon's Abr.* 382, *Stat.* 3. Referred to Acts of Congress, April 10, 1806. (*Story's Laws*, 100. 6.) *Act of* 1793, *ch.* 49. (*Ibid.* 282,) August 2, 1813, ch. 567. (*Ibid.* 1370,) 23d December, 1814. (*Ibid.* 1448–9.)

It has also another signification, equally distinct from *alien*. Ministers from abroad are called "foreign ministers," in the Act of Congress relative to their compensation. The *foreign* trade and commerce of the United States, are, in such terms, the subject of legislation. When applied to persons, it is the correlative of *native*. *Naturalized foreigner* is also in use.

The policy of the Act was to encourage persons from abroad to purchase and settle in the District, and an opposite construction of the Act, from that claimed by the plaintiff, would be in opposition to the purposes of the statute.

The right of every one from abroad, to purchase and transmit "to his heirs or relations," the real estate he may acquire, is conferred by positive statutes; it is absolute and vested, and not to be taken away by implication and inference. As to the

construction of statutes. Cited 6 *Bacon's Abr.* 6. 380. 386. 388. 389.

In reply to Mr. Key and Mr. Jones, Mr. Cox argued:

In regard to the etymology, *alien* is derived directly from the Latin *alienus*, and has in common parlance the same signification—foreigner is a modern word, derived either mediately or directly from *fores* and *origo*; whenever properly used, it refers to the origin, and not to any present relation. One of the authorities cited, employs the expression, "a foreigner who has been naturalized, and has become a denizen." It would be a solecism in language, to use the phrase "an alien who has been naturalized;" to be equalled only by the language employed in one of the Maryland statutes which has been referred to, which in express terms, calls foreigners who have been naturalized, "natural born subjects."

It is admitted as a general rule, that the naturalization refers back, and confirms a title previously acquired; but that is only when necessary to give validity to it. It can never relate back so as to preclude the party from appealing to the statute, as conferring upon him, originally, a valid title.

The conclusion which has been pressed, that the construction contended for would give to alien heirs, privileges, superior to those of natural born heirs, can derive no support from the law. They are only relieved from the disabilities incident to their alienage. A remote alien heir is not preferred to a nearer native heir.

It has been contended, that inasmuch as the party, by his naturalization lost his privilege of inheriting from them, the disability should be reciprocal. Such, however, is not the legal effect of becoming a citizen. An individual becoming naturalized under our laws, thereby loses no privilege of a foreign subject; he acquires no privileges, but loses none formerly possessed.

The law of Maryland merely preserves and legalizes inheritable blood, between a citizen and a foreigner; and enables the child or heir, not naturalized, to inherit as if he were. The construction contended for, makes it immaterial when the party became a citizen.

The policy of the two Acts of the legislature, and the naturalization laws, are harmonious and consistent. That if the latter is to induce aliens to become citizens, that of the former is to induce foreigners to purchase and reside in the district. The laws for naturalization ought not to be so construed, as by remote reference to involve as a consequence the abrogation and annihilation of privileges, vested in the latter as the proprietor of the land.

It is immaterial whether the privilege be considered as one

(Spratt et al. ex. Spratt.)

annexed to the person, or attached to the land; the person can only have it as the proprietor of the land, and the land can only have it as being so held.

Mr. Key and Mr. Jones, for the defendant in error. The construction contended for cannot be given to the Maryland statute: and 2d. If it could, it does not affect the case. There is no real distinction between the term "foreigner" and "alien." Their derivation is from words of the same import, and they are used synonymously, by writers of all descriptions. The rule of construction stated on the other side, is a correct one, viz: looking at other laws in *pari materia*, and seeing how the term in controversy is understood in them. This rule has been applied on the other side, by looking to the laws of the Congress of the United States, where the word "alien" is generally used as opposed to "citizen." But this does not aid us in endeavouring to understand what the *Maryland Legislature* meant by the expression. For this purpose, we must look to laws passed by the same legislature.

Look then to the Maryland laws of naturalization. These cases are evidently meant only to apply to such persons as the counsel for the appellant contends, are properly called "aliens." Such persons as are not citizens, but are to be made so. Yet the word used in all these laws, is the same word we find in the statute; we are now considering it is "foreigner."

We come at the meaning of the expression by considering the object of the law. It is to enable foreigners to take and hold and transmit lands, who were under disability to do so. Who were they? not "foreigners," as understood on the other side; who, though born in a foreign country, might have become citizens here, and be under no disability—but "foreigners," as understood by the legislature, who had not become citizens, and who were under the disability.

In the section in controversy, the word is used in plain opposition to "citizen." The persons it intended to provide for, are to take as if they were "citizens." By this construction of the word, the law is made to operate in cases where its operation is necessary. The contrary construction makes it operate where its operation is unnecessary.

2d. What has this law to do with the case?

James Spratt becomes naturalized, becomes to all intents and purposes an American citizen. He purchases lands—how is he entitled to hold them? By virtue of his citizenship. In the case before the Court, it is true he purchased one of the lots in question before his naturalization; it is well settled, that his naturalization relates back and protects his title. It is contended he takes the land not *as a citizen*, which he is, but as a foreigner, which he is not. That is, a law made for a man

who could not take without the law, is to give right to him who had it without the law. A citizen shall not take as a *citizen*, but under a law made for *foreigners*. If he *could* take by either, (and that is all that can be asked) yet must he not be held to take by the higher and better right?—by the privilege acquired by his citizenship, as the heir at law takes by descent where he is devisee? It is said this is taking away a privilege from him; what privilege? it is said—that of transmitting to his alien heirs; that by the Maryland laws, he had the right of holding lands and so transmitting them—and that it is taking away this right, to make him take as a citizen. But it is plain, that if he takes and transmits the land as a foreigner, under the Maryland law, notwithstanding his naturalization, that he must then transmit it to his foreign heirs to the exclusion of his own children, born here. This must be the case according to all decisions upon the subject, for a citizen cannot inherit to a foreigner, nor a foreigner to a citizen. If he holds as a foreigner; foreigners, by this Maryland law, will inherit. Citizens, though his own children, can by no law inherit if he holds as a foreigner. Here then would be the case of a citizen; and his own children, though citizens, are not to inherit to him. Can a citizen hold, in any other way than as a citizen? If he is a citizen, how can he take, why should he take, as a foreigner?—only for the sake of these foreign relations—surely not for his own. *They* show this Maryland law, and want him to take by *that*, though he chose to take by citizenship. *They* show a law, saying a man *may* take and transmit as a foreigner—but he may also choose to take by a better right, by citizenship—and he becomes naturalized. They ought to show a law, saying he *must* take and transmit as a foreigner.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.

This is an ejectment, brought in the Circuit Court for the district of Columbia, sitting in the county of Washington, for the recovery of several lots, lying in the county of Washington, of which James Spratt died seised. The lessors of the plaintiff are aliens, the legitimate brothers and sisters of the said James; and the defendant, who is also an alien, is his widow; James died without issue.

James Spratt came into America in the year 1812, and became a citizen on the 11th of October, in the year 1821. He purchased one of the lots before he became a citizen, and the others afterwards. The title to the lots in controversy, depends on the construction of an Act of the state of Maryland, passed the 19th of December 1791, entitled "An Act concerning the

(Spratt et al. ex. Spratt.)

territory of Columbia, and the city of Washington." The 6th section provides, "that any foreigner may, by deed or will, to be hereafter made, take and hold lands within that part of the said territory which lies within this state, in the same manner as if he was a citizen of this state; and the same lands may be conveyed by him, and transmitted to, and be inherited by his heirs or relations, as if he and they were citizens of this state; Provided, that no foreigner shall, in virtue hereof, be entitled to any further, or other privilege of a citizen." The facts were stated in a case agreed, which was substituted for a special verdict. The Circuit Court gave judgment for the defendant, to which the plaintiff has sued out a writ of error.

The plaintiff contends, that the word "foreigner," as used in the Act, designates a person born in a foreign country, and that such person does not cease to be a foreigner, by becoming a citizen of the United States. The words of the Act, therefore, apply to him, although he becomes a citizen, and enable him to take and transmit lands to his alien heirs or relations.

The Court is not of this opinion. The Act is an enabling Act, and applies to those only who could not take without it. It enables a *foreigner* to take "in the same manner as if he was a citizen." This language is entirely inapplicable to a *citizen*.

An Act to enable a citizen to take lands "as if he were a citizen," would be an absurdity too obvious to escape the notice of the legislature. We think, then, that a foreigner who becomes a citizen is no longer a foreigner within the view of the Act. His after purchased lands vest in him as a citizen, not by virtue of the Act of the legislature of Maryland.

The lot which he purchased while an alien, stands on different principles. This lot was acquired by a foreigner, under the Act which was passed for the purpose of enabling him to acquire it. He took and held it under the law, and could transmit it as prescribed by the law. The Act, after enabling him to take, adds, "and the same lands may be conveyed by him, and transmitted to, and be inherited by, his heirs or relations, as if he and they were citizens of this state." The capacity to transmit given by the Act, extends, in terms, to all lands acquired under the Act.

The lands taken, "may be conveyed by him," that is, by the taker, "and transmitted to his heirs or relations." This power of transmission is not restricted to his character as a foreigner, but belongs to him, as a person taking lands under the Act. The power of transmitting is connected with the power of taking, and is co-extensive with it. This power is within the words of the law; and the words which confer it are not inoperative, since they give a capacity which citizenship does not give—the capacity of transmitting to relations, who are

foreigners. This capacity is given, absolutely, by the Act; and is not, we think, affected, by his becoming a citizen.

The objection urged by the defendant to this construction, is, that it would perpetuate the title in aliens to the remotest times, because it attaches the privilege to the land, and not to the person.

We do not think the construction exposed to this objection.

The land passes to the heirs or relations of the said James Spratt, precisely as it would have passed had he remained a foreigner. The capacity is not in the land, but in the person, in relation to that land. It was in him when the land was purchased, and did not pass out of him, under the words of the law, by his becoming a citizen.

It is the opinion of a majority of the Court, that the Circuit Court erred, in deciding that judgment ought to be rendered for the defendant. It ought to be reversed, and the cause remanded to the Circuit Court, with directions to enter judgment for the plaintiff for the lot which was acquired by the said James Spratt, while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

This cause came on, &c., on consideration whereof, It is the opinion of this Court, that the said Circuit Court erred, in deciding that judgment ought to be rendered for the defendant, and that the same ought to be reversed. Therefore, it is ordered and adjudged by this Court, that the judgment of the said Circuit Court, in this cause, be, and the same is hereby reversed, and that the cause be remanded to the said Circuit Court, with directions to enter judgment for the plaintiff for lot No. which was acquired by the said James Spratt, while an alien, saving the widow's dower; and that his declaration be dismissed as to the residue.

MONTGOMERY BELL, PLAINTIFF IN ERROR, *vs.* JAMES MORRISON, ANTHONY BUTLER, AND JONATHAN TAYLOR, DEFENDANTS IN ERROR.

The authority given by the Act of Congress of 24th September 1789, chap. 20, to take depositions of witnesses, in the absence of the opposite party, is in derogation of the rules of the common law, and has always been construed strictly: and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. {355}

The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed. {356}

It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted to supply any defects in the taking the deposition. {356}

The statute of limitations in Kentucky, is subtantially the same with the statute of 21 *James* 2, *ch.* 16, with the exception, that it substitutes the term of *five* years instead of *six*. The English decisions have, therefore, been resorted to in this case, upon the construction of the statute of Kentucky, and are entitled to great consideration. They cannot be considered as conclusive upon the construction of a statute passed by a state, upon a like subject; for this belongs to the local state tribunals, whose rules of interpretation, must be presumed to be founded upon a more just and accurate view of their own jurisprudence. {359}

If the doctrines of the Kentucky Courts, in the construction of a statute of that state, are irreconcilable with the English decisions, upon a statute in similar terms; this Court, in conformity with its general practice, will follow the local law, and administer the same justice which the state Court would administer between the same parties. {360}

The statute of limitations, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, should have received such support from Courts of Justice, as would have made it, what it was intended, emphatically, to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time; but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. {360}

An exposition of the statute of limitations, which is consistent with its true object and import, is that expressed by this Court, in the case of Wetzell *vs.* Bussard, (11 *Wheat.* 309,) "an acknowledgment which will revive the original cause of action, must be *unqualified* and *unconditional*—it must show, positively, that the debt is due, in whole or in part. If it be connected with circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." {362}

If the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms, unequivocal and determinate; and if any conditions are annexed, they ought to be shown to be performed. {362}

(Bell *vs.* Morrison et al.)

If there be no express promise, but a promise is to be raised by implication of law, from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission, of a present subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expression be equivocal, vague, or indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; they ought not to go to a jury as evidence of a new promise, to revive the cause of action. {362}

The decisions of the Courts of Kentucky, giving a construction to the statute of limitations of that state, are in accordance with the principles which have been sanctioned by this Court. Those decisions evince a strong disposition of the Courts of Kentucky to restrict, within very close limits, any attempt to revive debts by implied promises resulting from acknowledgments or other confessions by parol. It is the duty of this Court, in a case arising in Kentucky, to follow out the spirit of those decisions so far as the Court is enabled to gather the principles on which they are founded. {363}

In the construction of local statutes, this Court has been in the habit of following the judgments of local tribunals. {363}

The admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time, from which it can be ascertained what the parties understood the balance to be, would not, by the Courts of Kentucky, be held sufficient to take the case out of the statute, and let in the plaintiff to prove, *aliunde*, any balance, however large it may be. It is indispensable for the party to prove, by independent evidence, the extent of the balance due to him, before there can arise any promise to pay it as a subsisting debt. {365}

The acknowledgment of a debt by one partner, after a dissolution of the copartnership, is not sufficient to take the case out of the statute, as to the other partners. {373}

A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained by the delegation of this authority to one partner. {370}

After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. {373}

When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. {373}

THIS was a writ of error to the seventh Circuit Court of the United States, for the district of Kentucky, sued out by the plaintiff below; and the case was presented for the consideration of this Court, upon a bill of exceptions, taken by the plaintiff in error.

An action of assumpsit was instituted against Charles Wilkins, Jonathan Taylor, James Morrison, Anthony Butler, and Isaac White, in 1823. The defendants, on the first of March 1810, by articles of agreement, under their respective hands and seals, entered into a partnership, for the purpose of manufacturing and vending salt, at Saline, near the Wabash, in the

then Illinois Territory, under the firm of Jonathan Taylor & Co.; and the object of this suit is the recovery of about twenty thousand dollars, claimed to be due on the sale and delivery of castings, to that value or amount. The evidence of the sale and delivery of the articles, and of their value, was complete; and the questions which were presented to the Court, by the record, were:—1st. Upon the decision of the Circuit Court, against the admission of a deposition, which had been intended to be taken in conformity with the provisions of the Act of Congress of the 24th September 1789, ch. 20, and in reference to the taking of which there was in all respects a compliance with the directions of the Act, with the exception, that the deposition was not certified to have been reduced to writing by the magistrate, or by the deponent in his presence; and,

2dly. On the exclusion of certain testimony, and the validity of the plea of the statute of limitations, upon which plea the decision of the Court having been in favour of the defendants, a verdict and judgment was rendered for them.

All the facts considered as proved in the case, and also the written and documentary testimony essential to a full understanding of the case are stated at length in the opinion of the Court, delivered by Mr. Justice Story.

The case, for the plaintiff in error, was presented to the Court by Mr. Rowan, and by Mr. Benton; and by Mr. Jones, for the defendants.

For the plaintiff in error, it was stated:—

1st. The Court erred in excluding the evidence offered by the plaintiff, to take the case out of the statute of limitations.

2d. In rejecting the deposition of John Mockbee.

1. The conversation, proved by the deposition of Patterson Baine, took place in 1818–1819, and the writ was issued in August 1820; and the language of Morrison, one of the defendants, is sufficient to repel the plea of the statute. He expressed his willingness "*to settle with the plaintiff*," but the books and papers of the concern were in the hands of Taylor. He said "he was anxious that the plaintiff's account should be settled." "I know we are owing you." "I am getting old, and I wish to have the business settled." He proposed to give the plaintiff $7,000, in satisfaction of the claim.

These acknowledgments are sufficient, on authority, to maintain this suit. The letters of Butler contain equivalent and similar expressions. The letter of Morrison has the same operation. 2 *Camp.* 11. 5 *Binn.* 573, 580, 582. 4 *Johns.* 468. 2 *T. R.* 660. Lloyd *vs.* Maund, 2 *Taunt.* 760, in which a new trial was granted, because the Judge at *Nisi Prius* had not left to the jury for their construction, a letter which contained an admission that something was due. All the cases go to establish the principle,

that where an acknowledgment is proved, the jury are the proper judges of its effect. The Court can only say, whether it is relevant to the subject matter.

Where several are liable, the acknowledgment of *one* will take the demand out of the statute, 6 *John.* 267. 2 *Bay*, 533. 2 *H. B.* 340. 2 *Doug.* 652. 3 *Camp.* 32. 2 *Camp.* 11.

Every partnership is, *quasi*, a corporation, and every individual in the firm a corporator, they having no power, by dissolution of the same, to affect the rights of creditors, and they continue a corporation until all their debts are paid. Every partner may maintain and give validity to the contract which was entered into during the partnerships. He does not make a new contract by a promise after the dissolution of the firm; but only continues the old one. The *whole* act, when one acts. There is no agency of one partner for another, but for the whole, where one acts. Secondly. The deposition of John Mockbee was taken according to all the essential requisites of the Act of Congress. It is certified to have been taken in the presence of the magistrate, "and that it is in the deponent's hand writing;" and these circumstances show a conformity with the statute.

Mr. Jones, for the defendants in error.

The question in this case, is whether the statute of limitations shall be restored to its original meaning, or be reduced, as it formerly was in England, to a nullity. The cases erroneously suppose that the statute proceeds on a presumption of a debt. The rule should be, that the acknowledgment should be such as, in itself, will support the claim, and thus render any evidence of the original debt unnecessary. The argument that the statute only prevents the remedy, is incorrect; if there is no remedy there is no debt.

The evidence does not show an acknowledgment of a debt, but expressions of a wish to buy peace; and if propositions were made for a settlement, they having been rejected, the transactions of the parties are still open. The original doctrine in England was, that there should be a new consideration as well as an acknowledgment, but the more recent cases require an acknowledgment *and an express promise to pay*, Clementson *vs.* Williams, 8 *Cranch*, 72. Wetzell *vs.* Buzzard, 11 *Wheat.* 309.

There are decisions upon this point in the state of Kentucky, whose statute is now to be construed. *Hardin's Rep.* 302. Harrison *vs.* Hanley, 1 *Bibb*, 445. 2 *Bibb*, 285. 3 *Bibb*, 271.

2. Whether the acknowledgment of a retired partner will bind the other partners? The acts of a partner, bind the partnership during its continuance, because each partner is the agent of the firm; Whitcomb and Whiting, 2 *Doug.* 625. After

dissolution, payment to the out going partner is invalid. *Montague on Partnerships*, 127. The acknowledgment of a partner to take a case out of the statute, is a new contract, and therefore cannot operate, if made after dissolution, *Montague, on Part.* 125, 127. *Watson on Part.* 448. Jackson *vs.* Fairbanks, 2 *H. Black.* 340. 1 *Barn. & Ald.* 463. *Norris Peake's Evidence*, 423. Wood *vs.* Braddick, 1 *Taunton*, 104.

Secondly. The deposition of John Mockbee was properly rejected. Depositions taken under the Act of Congress are *ex parte*, and the form established by law must be strictly complied with. The Act requires that the deposition shall be *written by the Judge or Justice taking it*, or written by *the witness in his presence.* This cannot be inferred, and must be stated in the certificate.

Mr. Justice STORY delivered the opinion of the Court.

This cause comes before us, upon a writ of error to the Circuit Court of the District of Kentucky. The original action was brought by the plaintiffs in error, against the defendants, on the 16th of August 1820; to recover the value of certain iron castings, sold and delivered to them by the plaintiff. The defendants pleaded *non assumpserunt*, and *non assumpserunt*, within five years; (the latter being the time prescribed by the Kentucky statute of limitations, in cases of this nature;) upon which pleas, the parties were at issue; and at the trial, a verdict was returned by the jury for the defendants; upon which, judgment passed in their favour. A bill of exceptions was taken to certain points, ruled by the Circuit Court at the trial; and the validity of these exceptions, has constituted the ground of the argument for the reversal, which has been insisted on in this Court.

The first objection urged, is the exclusion of the deposition of a Mr. Mockbee, which was offered by the plaintiff as testimony in the cause. The reason assigned for the exclusion, is, that there was no proof by the certificate of the magistrate, or otherwise, that the deposition was reduced to writing, in the presence of the magistrate. This is a point altogether dependant upon the construction of the Act of Congress of the 4th of September 1789, ch. 20; under the authority of which the deposition purports to be taken. The authority to take testimony in this manner, being in derogation of the rules of the common law, has always been construed strictly; and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. The Act of Congress provides, "That every person deposing as aforesaid, shall be carefully examined and cautioned, and sworn or affirmed, to testify the whole truth, and shall sub-

scribe the testimony by him or her given, after the same shall be reduced to writing; which shall be done only by the magistrate, taking the deposition, *or by the deponent in his presence.* And the deposition, so taken, shall be retained by such magistrate, until he deliver the same with his own hand into the Court for which they are taken; or shall, together with a certificate of the reasons as aforesaid of their being taken, and of the notice, if any was given to the adverse party, be by him the said magistrate, sealed up, and directed to such Court; and remain under his seal, until opened in Court."

Without doubt, the certificate of the magistrate is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed. It is not denied, that the reducing of the deposition to writing, in the presence of the magistrate, is a fact made material by the statute, and that proof of it, is a necessary preliminary to the right of introducing it at the trial. But it is supposed that sufficient may be gathered by intendment from the certificate of the magistrate, to justify the presumption that it was done. The certificate is in these words: "State of Tennessee, Dickson County, ss. At Charlotte, in said County, on the fourth day of July 1822, before me, James M. Ross, Justice of the peace, and one of the Judges of the County Court of Dickson County; came, personally, John Mockbee, being about the age of fifty-one years, and after being carefully examined and cautioned, and sworn, to testify the whole truth, did subscribe the foregoing and annexed deposition, after the same was reduced to writing, by him in his own proper hand." The certificate then proceeds to state the reason for taking the deposition, &c. in the usual form. It is remarkable that the certificate follows throughout, with great exactness of terms, every requisition in the statute, with the exception as to the deposition being reduced to writing in the presence of the magistrate; and it is scarcely presumable, that this was accidentally omitted. At all events, every word in the certificate may be perfectly true, and yet, the deposition may not have been reduced to writing in the magistrate's presence. If this be so, then there can arise no just presumption in favour of it. And we think, in a case of this nature; where evidence is sought to be admitted, contrary to the rules of the common law; something more than a mere presumption, should exist that it was rightly taken. There ought to be direct proof, that the requisitions of the statute have been fully complied with. We are therefore of opinion that the deposition was properly rejected.

The more important question in the cause, is that relative to the evidence introduced to repel the plea of the statute of

limitations. In the course of the trial, the plaintiff read to the jury certain articles of copartnership, made between the defendants in March 1810; whereby the defendants entered into a joint trade and partnership, in the manufacturing of salt, at a place known by the name of the United States' Saline, near the Wabash River within the Illinois Territory, for the term of three years, then next ensuing, under the style of Taylor, Wilkins & Co. He also gave evidence, that large quantities of iron castings had been sold and delivered by him to the company, during the term of the copartnership. He then introduced the testimony of one Patterson Baine, who stated, "that some time in the year 1818, or 1819, the plaintiff, Bell, came to his house, in Lexington, and stated, that he had again come up, to endeavour to get the amount of his account from the defendants. He requested the witness to go with the plaintiff to Col. Morrison's, (one of the defendants,) on that business. The witness went. The plaintiff and Morrison had a good deal of conversation, on the subject of the plaintiff's account against the Saline Company for metal furnished, which is not recollected by the witness. The witness recollects, that Morrison stated, that the books and papers relative to the plaintiff's claim were in the hands of Jonathan Taylor, (one of the defendants,) which put it out of his power to settle the account at that time, and expressed a willingness, but for that reason, to settle with the plaintiff. The plaintiff bade him good bye, and declared that that was the last time he should ever apply for a settlement of his account. The plaintiff then left the house of Morrison, and returned with the witness to his house, where he remained until after breakfast on the next day;—that shortly after breakfast, Morrison came to the house of the witness, and said to Bell, (the plaintiff,) that he was very anxious, that his, (the plaintiff's) account, should be settled; adding, "I know we are owing you, and I am anxious it should be settled." He then mentioned to the plaintiff, that he, (Morrison,) was getting old, and did not like to have such things hanging over him, and wished to have the business settled, and to have done with it. He then proposed to give the plaintiff seven thousand dollars, and close the business. The plaintiff refused to take it, and they parted;—that no account, or papers of any kind, were shown or produced by Bell, at the time of these conversations with Morrison; but he understood the conversations to relate to the claim for castings, furnished by him to the company of Taylor, Wilkins and others. The witness observed to the plaintiff, after Morrison's departure, that he should have taken Morrison's offer; that "a half loaf was better than no bread." The plaintiff also introduced certain letters written by Morrison and Butler, (two of the defendants,) to him. The first was

a letter from Morrison, dated 2d of October 1814; and it contains, among others, the following expressions:—"I wish whatever is due to you should be paid;—I have once more to ask you to follow the advice I am about to offer, viz: to come up here, without delay, (as Col. Butler may be soon ordered off,) and I cannot believe your present suit will answer any purpose," &c. &c. "It is not our wish to keep from you, whatever may be your just due. We have sent for the company books, some two or three weeks since; they will come to Louisville by water; and on your and Mr. Wheatley's being there, I have no doubt but your account can be adjusted; and that, more to your satisfaction, than it ever can be from the result of your suit," &c. "I wish your account settled; and, I have no hesitation in saying, on your coming here, it will be done." The next was a letter from Butler, dated 26th October 1817, in which he informs the plaintiff, that, on the 20th of November, Messrs. Morrison and Wilkins will be at Hopkinsville, "for the purpose of adjusting some of the affairs of the old Saline Company," &c.; and desires that he "will be present, in order that a settlement may be effected, if possible, of the account which you, (he,) set up against the company." The next is from Butler, dated the 8th of November 1817, again mentioning the intended meeting on the 20th of November, "for the purpose of adjusting our old account with you;" and he adds, "I hope, therefore, you will be at Hopkinsville, for the purpose of enabling us to settle this old affair, to which, I am sure, all must be most anxious." The next is from Butler, dated 23d of October 1818, in which he alludes to a complaint made by the plaintiff, of Butler's absence from home on the 5th of the same month, when the plaintiff called there, and reminds the plaintiff of a conversation they had at the Greenville Springs, "about a day of meeting to adjust the account between the former Saline Company and yourself," and excuses himself for his absence. He adds, "I have now, Sir, attended at three places, upon three appointments made by yourself and myself, without being able to have a meeting, &c. If it would suit you to be at Frankfort, during the sitting of the legislature, we might possibly come to some understanding on the subject." The next is a letter from Jonathan Taylor, (one of the defendants,) to the plaintiff, dated 13th March 1818, in which he says, "I received a letter last Monday from Col. Butler, inviting me to attend an appointment with you at Hopkinsville, on the 26th of this month, for the purpose of adjusting the old company account. I shall endeavour to attend at that time, when, if we can make an arrangement, equally mutual, for the metal I may *hereafter* want, it can be done." Other letters

of Taylor were read in evidence, but they all bear date in the years 1811, and 1812.

It was further proved, that the plaintiff was present in 1814, when the Saline and improvements were delivered over to Bates, the succeeding lessee; and that the plaintiff was then apprized, that the term of the defendants, as lessees, had terminated. After the evidence on the part of the plaintiff was closed, the defendants' counsel moved the Court to exclude the testimony of Patterson Baine, and all the letters bearing date within five years before the bringing of this suit, offered by the plaintiff, to show a promise on the part of the defendants, or any one of them, or any member of said firm or partnership, within five years next before the commencement of this suit; and the Court so excluded from the jury the evidence of the said Bane, and all the letters dated within five years aforesaid, tending to prove a promise in five years, next before the commencement of this suit, by the defendants, or either of them, or any member of said firm or partnership, as prayed by the defendants' counsel; and decided, that "there was no sufficient evidence or admissions by the defendants, or either of them, or any member of said firm or partnership, to prove such a promise, in five years before the commencement of this suit, as would take the case out of the statute of limitations, or should be left to the jury, as conducing to that effect." To which opinion of the Court the plaintiff filed his bill of exceptions; and the correctness of this opinion has constituted the main ground of the elaborate argument at this bar.

Two points are necessarily involved in the discussion of this opinion. The first is, whether the evidence so excluded, (supposing it to be, in all other respects, unobjectionable,) was competent, in point of law, to have been left to the jury to infer a promise sufficient to take the case out of the statute of limitations. The second is, whether, supposing it would be competent, in ordinary cases, the fact that it was the acknowledgment or promise of one partner, after the dissolution of the partnership, did not justify its exclusion, as incompetent evidence to bind the other partners.

The statute of limitations of Kentucky, is substantially the same with the statute of 21 of James, ch. 16, with the exception, that it substitutes the term of five years instead of six. The English decisions have, therefore, been resorted to, upon the present occasion, as illustrative of the true construction of the statute, and, in this view, are doubtless entitled to great consideration. They are not, however, and cannot be considered as conclusive authority, upon the construction of the statute passed by a state, upon the like subject; for this justly belongs to the local state tribunals, whose rules of interpreta-

tion must be presumed to be founded upon a more just and accurate view of their own jurisprudence, than those of any foreign tribunal, however respectable. If, therefore upon examination it shall be found, that the doctrines of the Kentucky Courts, upon this subject, are irreconcilable with those deduced from the statute of James, this Court would, in conformity with its general practice, follow the local law, and administer the same justice which the state Court would administer between the same parties.

It has often been matter of regret, in modern times, that, in the construction of the statute of limitations, the decisions had not proceeded upon principles better adapted to carry into effect the real objects of the statute; that, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, it had received such support, as would have made it, what it was intended to be, emphatically, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time, but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. It has a manifest tendency to produce speedy settlements of accounts, and to suppress those prejudices which may rise up at a distance of time, and baffle every honest effort to counteract or overcome them. Parol evidence may be offered of confessions, (a species of evidence which, it has been often observed, it is hard to disprove, and easy to fabricate,) applicable to such remote times, as may leave no means to trace the nature, extent, or origin of the claim, and thus open the way to the most oppressive charges. If we proceed one step further, and admit that loose and general expressions, from which a probable or possible inference may be deduced of the acknowledgment of a debt, by a Court or jury; that, as the language of some cases has been, any acknowledgment, however slight, or any statement not amounting to a denial of the debt; that any admission of the existence of an unsettled account, without any specification of amount or balance, and however indeterminate and casual, are yet sufficient to take the case out of the statute of limitations, and to let in evidence, *aliunde*, to establish any debt, however large, and at whatever distance of time; it is easy to perceive, that the wholesome objects of the statute, must be, in a great measure, defective; and the statute virtually repealed.

The English decisions upon this subject, have gone great lengths—greater, indeed, in our judgment, than any sound interpretation of the statute will warrant; and, in some instances, to an extent which is irreconcilable with any just princi-

ple. There appears, at present, a disposition on the part of the English Courts to retrace their steps; and, as far as they may, to bring back the doctrine to sober and rational limits. The American Courts have evinced a like disposition. In the recent case of Bangs *vs.* Hall, 2 *Picker. Rep.* 368, the principal cases were reviewed by the Supreme Court of Massachusetts; and it was held, that to take a case out of the statute, there must be an unqualified acknowledgment, not only of the debt as originally due, but that it continues so; and if there has been a conditional promise, that the condition has been performed —a doctrine, quite as comprehensive, has been asserted in the Supreme Court of New-York. The subject was much considered in the case of Sands *vs.* Gelston, 15 *Johns. Rep.* 511, where Mr. Chief Justice Spencer, in delivering the opinion of the Court, said, "that if at the time of the acknowledgment of the existence of the debt, such acknowledgment is qualified in a way to repel the presumption of a promise to pay, it will not be evidence of a promise sufficient to revive the debt, and take it out of the statute." In consonance with this principle, the same Court has held, that "if the acknowledgment be accompanied with a declaration that the party intends to rely on the statute as a defence, such an acknowledgment is wholly insufficient."* In the case of Clementson *vs.* Williams, 8 *Cranch*, 72, this Court expressed the opinion that the decisions on this subject had gone full as far as they ought to be carried, and that the Court was not inclined to extend them; that the statute of limitations was entitled to the same respect with other statutes, and ought not to be explained away. In that case, an attempt was made to charge a partnership, by an acknowledgment made after its dissolution, by one of the partners, when an account was presented to him, that "the account was due, and he supposed it had been paid by the other partner, but he had not paid it himself, and did not know of its being ever paid." It was held, that this was not a sufficient acknowledgment to take the case out of the statute. The Chief Justice, in delivering the opinion of the Court, said, "in this case there is no promise, conditional or unconditional, but a simple acknowledgment. This acknowledgment goes to the original justice of the account. But this is not enough. The statute of limitations was not enacted to protect persons from claims fictitious in their origin, but from ancient claims, whether well or ill founded, which may have been discharged, but the evidence of discharge may be lost. It is not sufficient to take the case out of the Act, that the claim should be proved, or be ac-

* See also Brown *vs.* Campbell, 1 *Serg. & Rawle*, 176. Tries *vs.* Boiselet, 9 *Serg. & Rawle*, 128.

knowledged to have been originally just; the acknowledgment must go to the fact, that it is still due."

In the case of Wetzell *vs.* Bussard, 11 *Wheat.* 309, the subject again came before this Court; and the English and American authorities were deliberately examined. The Court there expressly held, that "an acknowledgment which will revive the original cause of action, must be unqualified and unconditional. It must show, positively, that the debt is due, in whole or in part. If it be connected with circumstances, which in any manner affect the claim, or if it be conditional, it may amount to a new *assumpsit*, for which the old debt is a sufficient consideration; or, if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown."

We adhere to the doctrine thus stated, and think it the only exposition of the statute, which is consistent with its true object and import. If the bar is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms unequivocal and determinate; and, if any conditions are annexed, they ought to be shown to be performed.

If there be no express promise, but a promise is to be raised by implication of law from the acknowledgment of the party, such acknowledgment ought to contain an unqualified and direct admission of a previous, subsisting debt, which the party is liable and willing to pay. If there be accompanying circumstances, which repel the presumption of a promise or intention to pay; if the expressions be equivocal, vague, and indeterminate, leading to no certain conclusion, but at best to probable inferences, which may affect different minds in different ways; we think they ought not to go to a jury as evidence of a new promise to revive the cause of action. Any other course would open all the mischiefs against which the statute was intended to guard innocent persons, and expose them to the dangers of being entrapped in careless conversations, and betrayed by perjuries.

It may be that in this manner an honest debt may sometimes be lost, but many unfounded recoveries will be prevented; and viewing the statute in the same light, in which it was viewed by English Judges at an early period, as a beneficial law, on which the security of all men depends, we think its provisions ought not to be lightly overturned; and that no creditor has a right to complain of a strict construction, since it is only by his own fault and laches, that it can be brought to bear injuriously upon him. And, if the early interpretation had been adhered to, that nothing but an express promise should take

a case out of the statute, it is far from being certain, that it would not have generally been in promotion of justice.

But the present case is not left to be determined solely upon general principles and authorities. There is a series of decisions of the Kentucky Courts, upon the construction of their own statute of limitations, which, if they differed from those of other Courts, would, as matter of local law, govern this Court upon the present occasion. In the construction of local statutes we have been in the habit of respecting and following the judgments of the local tribunals.

The first, and leading case, is Bell *vs.* Rowlands Administrators, in Hardin's Reports, 301. In that case, the defendant made an acknowledgment, "that he had once owed the plaintiff, but he supposed his brother had paid it, in Virginia, (the place where the original transaction took place, in the year 1785;) and if his brother had not paid it, he owed it yet." The Court held that the acknowledgment was not sufficient to take the case out of the statute; that the defendant was not bound to prove that his brother had not paid the debt; that the law would imply a promise, only, where the party ought to promise; and that the defendant ought not to have promised, under the circumstances of that case, to pay a debt which he supposed to be paid. But the general reasoning of the Court, which is drawn up with great clearness and force, goes much further. The Court said, that the English decisions were not obligatory upon them, in the construction of their own statute, although similar in its provisions to the English statute; and that so far as they had gone upon nice refinements, for the purpose of evading the statute, they must be disregarded. If the slightest acknowledgment; if strained, constructive acknowledgments and promises, are held sufficient; it must multiply litigation, produce endless uncertainty, and it is to be feared, a fruitful crop of perjuries.

Slight circumstances, and a man's loose expressions, would be construed into a full acknowledgment of the debt, when he himself neither intended to make, nor understood himself as making any acknowledgment at all. Instances of this sort are frequent in the books; but the example is too dangerous to be countenanced. And the Court further declared, "upon the whole, we are of opinion that the only safe rule that can be adopted, capable of any reasonable certainty, is, that in order to take the case out of the statute of limitations, an *express* acknowledgment of the debt, as a debt due at the time, coupled with the original consideration; or an *express* promise to pay it; must be proved to have been made, within the time prescribed by the statute.

There was another point in the case, deserving of notice,

which was, whether the Court ought to have instructed the jury as to the law of the case, and then have left it with them to determine, whether an acknowledgment of the debt, and a promise to pay it, had been proved to have been made within the five years; upon which it was held, that it was competent for the Court, either to do so, or, (as it did in that case,) taking the whole of the evidence on the part of the plaintiff as true, and the facts sworn to by the witnesses as sufficiently proved, to instruct the jury as to the law arising upon those facts.

This case has never been departed from in Kentucky, and has been frequently recognised. In Harrison *vs.* Handley, (1 *Bibb R.* 443,) the plaintiff, to take the case out of the statute, produced a witness, who swore, "that some time in May or June 1796, he presented an account to W. H. (the defendant) amounting to £250, or £260; that H. objected to certain articles in the said account; and after the said articles were stricken out of the account; H. then acknowledged, *it was all right.* The Court below ruled that this was such an acknowledgment as took the case out of the statute, but the decision was reversed by the Court of Appeals. Mr. Chief Justice Bibb, in delivering the opinion of the Court, adverted to the case of Bell *vs.* Rowlands administrators; and recognised its authority in the fullest terms. And after expressing a doubt, whether an *implied* promise would not be barred by the statute, he proceeded to say, "Be that as it may, mere loose expressions and vague acknowledgments will not suffice. The acknowledgment from which the law is to raise a promise, contrary to the provisions of the statute, must be clear and express, where the mind is brought directly to the point, debt or no debt, at the present time; not whether the debt was once an existing debt. That the law will argumentatively make it a debt, *in præsenti*, if the party does not in his acknowledgment say it is not, or prove payment; is a proposition, that cannot be granted in opposition to the provisions of the statute. Where the limitation has run, to get clear of it, the whole burthen of proof is thrown on the plaintiff, *to prove a good and subsisting debt, and a promise to pay* within the period prescribed to his action. The acknowledgment of H. does not come up to this requisition. There was no express promise to pay; there was no express acknowledgment of a then subsisting debt; there was no assent to pay. "H. then acknowledged the *amount was all right*," is too loose, vague, and indefinite an acknowledgment to revive a transaction, and put it under investigation again, after the law had closed it. That the amount was right, could be true, and might well be acknowledged, if the articles had been truly noted notwithstand-

ing the party might have paid it, or was unwilling to acknowledge it as a debt then subsisting; and that is the point to which an express acknowledgment should have been proved." This is certainly a very strong case to illustrate the rule, adopted in Kentucky.

In Gray *vs.* Lawridge (2 *Bibb R.* 284,) it was proved on the trial, that the party had admitted the justice of the account within five years, and that it might go in discharge of the interest due on a bond of the defendant, on which the suit was brought by the plaintiff. The witness did not know the particular items of the account, nor the amount thus acknowledged by the plaintiff. The Court held, that the acknowledgment did not go further, than that the demand should be allowed in payment of the interest; and that so much as the party could show of a debt due to him *not exceeding the amount of the interest* then due, was taken out of the statute, and no further. In Ormsby *vs.* Letcher, (3 *Bibb R.* 269,) it was decided, that an agreement of the defendant within five years, that a settlement, made with the brother of the defendant should be subject to the examination of either party, did not take the case out of the statute. It may be inferred, that it was a settlement of accounts between the parties, and that the action was brought for the balance due to the plaintiff; although the report does not so state. The Court said, "this agreement does not contain an acknowledgment of a subsisting demand, and a promise to pay in consideration thereof." The language of this case, as well as that in Harrison *vs.* Handley, might lead to the impression, that the Court thought that an acknowledgment of a subsisting debt, was not alone sufficient; but that there must be also a promise to pay the debt. But, perhaps it is more correct to construe it as importing no more than that there must be such an acknowledgment, coupled with circumstances, from which a promise to pay would naturally and irresistibly be implied.

These are all the decisions, which we have met with in the Kentucky Reports on this point. They evince a strong disposition, in the Courts of that state, to restrict, within very close limits, every attempt to revive debts by implied promises, resulting from acknowledgments and other confessions by parol. It is our duty to follow out the spirit of these decisions, so far as we are enabled to gather the principles on which they are founded, and to apply them to the case at bar.

The evidence in the case at bar, resolves itself into two heads; first, whether the admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time from which it can be ascertained what the

parties understood the balance to be; is sufficient to take the case out of the statute, and let in the plaintiff to prove, *aliunde*, any balance, however large it may be: secondly, if not, whether the admission on the part of Morrison, of his willingness to pay 7,000 dollars, and close the business, might (under all the circumstances,) entitle the plaintiff to recover that amount, and thus to furnish a just objection to the ruling of the Circuit Court.

In both of these views, the case is not without its difficulties; and the Kentucky decisions present no authority directly in point. The evidence is clear of the admission of an unsettled account, as well from the letters of Butler, as the conversation of Morrison. The latter acknowledged that the partnership "was owing" the plaintiff; but as he had not the books, he could not settle with him. If this evidence stood alone, it would be too loose to entitle the plaintiff to recover any thing. The language might be equally true, whether the debt were one dollar or ten thousand dollars. It is indispensable for the plaintiff to go further, and to establish, by independent evidence, the extent of the balance due him, before there can arise any promise to pay it as a subsisting debt. The acknowledgment of the party, then, does not constitute the sole ground of the new implied promise; but it requires other intrinsic aid, before it can possess legal certainty. Now, if this be so, does it not let in the whole mischief intended to be guarded against by the statute? Does it not enable the party to bring forward stale demands, after a lapse of time, when the proper evidence of the real state of the transaction cannot be produced? Does it not tend to encourage perjury, by removing the bar upon slight acknowledgments of an indeterminate nature? Can an admission, that something is due or some balance owing, be justly construed into a promise to pay any debt or balance, which the party may assert or prove before a jury? If there be an express promise to such an effect, that might be pressed as a dispensation with the statute; but the question here is, whether the law will imply such a promise, from language so doubtful and general. The language of the Court, in Harrison *vs.* Hanley, was, that "mere loose expressions or vague acknowledgments, will not suffice." We think, that such a general admission of an unsettled account, and of an indeterminate debt, would, by the Courts of Kentucky, be held as too vague an acknowledgment to take the case out of the statute. It would not establish any particular subsisting debt, and therefore be destitute of reasonable certainty to raise an implied promise.

The other point is also not without its embarrassments. Was Morrison's offer of 7,000 dollars, to close the business, the absolute admission of a debt to that amount, or a conditional pro-

mise to pay that sum, if the party would accept it in discharge of his claims? We think, taking all the circumstances, it scarcely admits of the former interpretation. It appears from the testimony itself, that Morrison did not know the state of the partnership accounts, and had not the partnership books to enable him to ascertain it. He also expressed a personal reason for his desire to settle the account, alleging that he was growing old, and was anxious for a settlement. His offer must therefore be deemed to be in the nature of a compromise, to pay the sum, if the plaintiff would give a complete discharge of his claims; or, to use his own words, "and close the business." It may, therefore, be fairly deemed a conditional offer to pay a conjectural, not a known balance; to buy peace, and not to acknowledge an absolute debt. If this be, as we think it is, a conditional offer, then, upon the clear text of the Kentucky, as well as the English, and of other American decisions; the case would not be taken out of the statute, unless the plaintiff had performed the condition.

But if this view of the case should be more doubtful than it seems to us to be, it still remains to consider, whether the acknowledgment of one partner, after the dissolution of the copartnership, is sufficient to take the case out of the statute, as to all the partners. How far it may bind the partner, making the acknowledgment to pay the debt, need not be inquired into; to maintain the present action, it must be binding upon all.

In the case of Bland *vs.* Haslering, (2 *Vent.* 151,) where the action was against four, upon a joint promise, and the plea of the statute of limitations was put in, and the jury found that one of the defendants did promise within six years, and that the others did not; three judges, against Ventris J. held that the plaintiff could not have judgment against the defendant, who had made the promise. This case has been explained upon the ground that the verdict did not conform to the pleadings, and establish a *joint* promise. It is very doubtful, upon a critical examination of the report, whether the opinion of the Court, or of any of the Judges proceeded solely upon such a ground.

In Whitcomb *vs.* Whiting, (2 *Doug. R.* 652,) decided in 1781, in an action on a joint and several note brought against one of the makers, it was held that proof of payment, by one of the others, of interest on the note and of part of the principal, within six years, took the case out of the statute, as against the defendant who was sued. Lord Mansfield said, "payment by one is payment for all, the one acting virtually for all the rest; and in the same manner, an admission by one is an admission by all, and the law raises the promise to pay, when the debt is admitted to be due." This is the whole reasoning re-

ported in the case, and is certainly not very satisfactory. It assumes that one party who has authority to discharge, has, necessarily, also, authority to charge the others; that a virtual agency exists in each joint debtor to pay for the whole; and that a virtual agency exists, by analogy, to charge the whole. Now, this very position constitutes the matter in controversy. It is true, that a payment by one, does enure for the benefit of the whole; but this arises not so much from any virtual agency for the whole, as by operation of law; for the payment extinguishes the debt; if such payment were made after a positive refusal or prohibition of the other joint debtors, it would still operate as an extinguishment of the debt, and the creditor could no longer sue them. In truth, he who pays a joint debt, pays to discharge himself; and so far from binding the others conclusively by his act, as virtually theirs also, he cannot recover over against them, in contribution, without such payment has been rightfully made, and ought to charge them.

When the statute has run against a joint debt, the reasonable presumption is that it is no longer a subsisting debt; and therefore, there is no ground on which to raise a virtual agency to pay that which is not admitted to exist. But, if this were not so, still there is a great difference between creating a virtual agency, which is for the benefit of all, and one which is onerous and prejudicial to all. The one is not a natural or necessary consequence from the other. A person may well authorize the payment of a debt for which he is now liable; and yet refuse to authorize a charge, where there at present exists no legal liability to pay. Yet, if the principle of Lord Mansfield be correct, the acknowledgment of one joint debtor will bind all the rest, even though they should have utterly denied the debt at the time when such acknowledgment was made.

The doctrine of Whitcomb *vs.* Whiting, has been followed in England in subsequent cases, and was applied to in a strong manner, in Jackson *vs.* Fairbank, (2 *H. Bl.* 340,) where the admission of a creditor to prove a debt, on a joint and several note under a bankruptcy, and to receive a dividend, was held sufficient to charge a solvent joint debtor, in a several action against him, in which he pleaded the statute, as an acknowledgment of a subsisting debt. It has not, however, been received without hesitation. In Clark *vs.* Bradshaw, (3 *Esp. R.* 155,) Lord Kenyon, at *Nisi Prius*, expressed some doubts upon it; and the cause went off on another ground. And in Brandram *vs.* Wharton, (1 *Barn. & Ald.* 463,) the case was very much shaken, if not overturned. Lord Ellenborough, upon that occasion used language, from which his dissatisfaction with the whole doctrine, may be clearly inferred. "This doctrine," said he, "of rebutting the statute of limitations by an acknowledgment other

than that of the party himself, begun with the case of Whitcomb *vs.* Whiting. By that decision, where however there was an *express* acknowledgment, by an actual payment of a part of the debt by one of the parties, I am bound. But that case was full of hardship; for this inconvenience may follow from it. Suppose a person liable jointly with thirty or forty others, to a debt, he may have actually paid it, he may have had in his possession the document, by which that payment was proved, but may have lost his receipt. Then, though this was one of the very cases which this statute was passed to protect, he may still be bound and his liability be renewed, by a random acknowledgment made by some one of the thirty or forty others, who may be careless of what mischief he is doing, and who may even not know of the payment which has been made. Beyond that case, therefore, I am not prepared to go, so as to deprive a party, of the advantage given him by the statute, by means of an *implied* acknowledgment."

The English cases decided since the American Revolution, are by an express statute of Kentucky, declared not to be of authority in their Courts; and consequently Whitcomb *vs.* Whiting in Douglas, and the cases which have followed it, leave the question in Kentucky quite open to be decided upon principle.

In the American Courts, so far as our researches have extended, few cases have been litigated upon this question.* In Smith Damor *vs.* D. & G. Ludlow, 6 *Johns. R.* 267, the suit was brought against both partners, and one of them pleaded the statute. Upon the dissolution of the partnership, public notice was given, that the other partner was authorized to adjust all accounts; and an account signed by him, after such advertisement, and within six years, was introduced. It was also proved, that the plaintiff called on the partner who pleaded the statute, before the commencement of the suit, and requested a settlement, and that he then admitted an account, dated in 1797, to have been made out by him;—that he thought the account had been settled by the other defendant, in whose hands the books of the partnership were, and that he would see the other defendant on the subject, and communicate the result to the plaintiff. The Court held that this was sufficient to take the case out of the statute; and said, that without any express authority, the confession of one partner, after the dissolution, will take a debt out of the statute. The acknowledgment will not,

* The Reporter has been informed, by Mr. Chief Justice Gibson, that, at the December Term, 1827, of the Supreme Court of Pennsylvania, the Court decided, after full argument, that the acknowledgment by a partner, after the dissolution of the partnership, will not take the debt out of the statute, so as to make the other former partners liable. This case will be reported by Messrs. Sergeant & Rawle.

of itself, be evidence of an original debt; for, that would enable one party to bind the other in new contracts. But the original debt being proved or admitted, the confession of one will bind the other, so as to prevent him from availing himself of the statute. This is evident, from the cases of Whitcomb *vs.* Whiting, and Jackson *vs.* Fairbank; and it results necessarily from the power given to adjust accounts. The Court also thought the acknowledgment of the partner setting up the statute, was sufficient of itself to sustain the action. This case has the peculiarity of an acknowledgment made by both partners, and a formal acknowledgment by the partner who was authorized to adjust the accounts after the dissolution of the partnership. There was not, therefore, a virtual, but an express, and notorious agency, devolved on him, to settle the account. The correctness of the decision, cannot, upon the general view taken by the Court, be questioned. In Roosevelt *vs.* Marks, 6 *Johns. Ch. Rep.* 266. 291. Mr. Chancellor Kent admitted the authority of Whitcomb *vs.* Whiting; but denied that of Jackson *vs.* Fairbank, for reasons which appear to us solid and satisfactory. Upon some other cases in New-York, we shall have occasion hereafter to comment. In Hunt *vs.* Bridgham, 2 *Pick. R.* 581, the Supreme Court of Massachusetts, upon the authority of the cases in Douglass, H. Blackstone, and Johnson, held that a partial payment by the principal debtor on a note, took the case out of the statute of limitations, as against a surety. The Court do not proceed to any reasoning to establish the principle, considering it as the result of the authorities. Shelton *vs.* Cocke, 3 *Mumford's R.* 191, is to the same effect; and contains a mere annunciation of the rule, without any discussion of its principle. Simpson *vs.* Morrison, 2 *Bay's Rep.* 533, proceeded upon a broader ground, and assumes the doctrine of the case in 1 *Taunt. Rep.* 104, hereinafter noticed, to be correct. Whatever may be the just influence of such recognitions of the principles of the English cases, in other states; as the doctrine is not so settled in Kentucky, we must resort to such recognition, only, as furnishing illustrations, to assist our reasoning; and decide the case now as if it had never been decided before.

By the general law of partnership, the act of each partner, during the continuance of the partnership and within the scope of its objects, binds all the others. It is considered the act of each and of all, resulting from a general and mutual delegation of authority. Each partner may, therefore, bind the partnership by his contracts in the partnership business; but he cannot bind it by any contracts beyond those limits. A dissolution however puts an end to the authority. By the force of its terms it operates as a revocation of all power to create new contracts;

and the right of partners as such can extend no further than to settle the partnership concerns already existing, and to distribute the remaining funds. Even this right may be qualified, and restrained, by the express delegation of the whole authority to one of the partners.

The question, is not however as to the authority of a partner after the dissolution to adjust an admitted and subsisting debt; we mean, admitted by the whole partnership or unbarred by the statute; but whether he can, by his sole act, after the action is barred by lapse of time, revive it against all the partners, without any new authority communicated to him for this purpose. We think the proper resolution of this point depends upon another, that is, whether the acknowlegdment or promise, is to be deemed a mere continuation of the original promise, or a new contract, springing out of and supported by the original consideration. We think it is the latter, both upon principle and authority; and if so, as after the dissolution no one partner can create a new contract, binding upon the others, his acknowledgment is inoperative and void, as to them.

There is some confusion in the language of the books, resulting from a want of strict attention to the distinction here indicated. It is often said that an acknowledgment revives the promise, when it is meant, that it revives the *debt* or *cause of action*. The revival of a debt, supposes that it has been once extinct and gone; that there has been a period in which it had lost its legal use and validity. The act which revives it, is what essentially constitutes its new being, and is inseparable from it. It stands not by its original force, but by the new promise; which imparts vitality to it. Proof of the latter is indispensable to raise the *assumpsit*, on which an action can be maintained. It was this view of the matter, which first created the doubt, whether it was not necessary that a new consideration should be proved to support the promise, since the old consideration was gone. That doubt has been overcome; and it is now held, that the original consideration is sufficient, if recognised, to uphold the new promise, although the statute cuts it off, as a support for the old. What, indeed, would seem to be decisive on this subject, is, that the new promise if qualified or conditional, restrains the rights of the party to its own terms; and if he cannot recover, by those terms, he cannot recover at all. If a person promise to pay, upon condition that the other do an act, performance must be shown, before any title accrues. If the declaration lays a promise by or to an intestate, proof of the acknowledgment of the debt by or to his personal representative, will not maintain the writ. Why not, since it establishes the continued existence of the

(Bell vs. Morrison et al.)

t? The plain reason is, that the promise is a new one, by
to the administrator himself, upon the original considera-
n; and not a revival of the original promise. So, if a man
romises to pay a pre-existing debt, barred by the statute, when
e is able, or at a future day, his ability must shown; or the
ime must be passed before the action can be maintained. Why?
Because it rests on the new promise, and its terms must be
complied with. We do not here speak of the form of al-
leging the promise in the declaration; upon which, perhaps,
there has been a diversity of opinion and judgment; but of the
fact itself, whether the promise ought to be laid in one way or
another, as an absolute, or as a conditional promise; which
may depend upon the rules of pleading.

This very point came before the twelve Judges, in the case
of Hyling *vs.* Hastings, (1 *Ld. Raym.* 389, 421,) in the time of
Lord Holt. There, one of the points was, "whether the ac-
knowledgment of a debt within six years, would amount to a
new promise, to bring it out of the statute; and they were all
of opinion, that it would not, but that it was *evidence* of a pro-
mise." Here then, the Judges manifestly contemplated the ac-
knowledgment, not as a continuation of the old promise, but
as evidence of a *new* promise; and that it is the *new promise*,
which takes the case out of the statute. Now, what is a new
promise, but a new contract? a contract to pay, upon a pre-
existing consideration, which does not, of itself, bind the party
to pay, independently of the contract? So, in Boydell *vs.* Drum-
mond, 2 *Camp. R.* 157, Lord Ellenborough, with his character-
istic precision, said, "if a man acknowledges the existence of
a debt, barred by the statute, the law has been supposed to
raise a *new* promise to pay it, and thus the *remedy* is revived."
And it may be affirmed, that the general current of the Eng-
lish, as well as the American authorities, conforms to this
view of the operation of an acknowledgment. In Jones *vs.*
Moore, (5 *Binney R.* 573,) Mr. Chief Justice Tilghman, went
into an elaborate examination of this very point; and came to
the conclusion, from a review of all the cases; that an ac-
knowledgment of the debt, can only be considered as evidence
of a *new* promise; and he added, "I cannot comprehend the
meaning of *reviving* the old debt, in any other manner, than by
a *new* promise."

There is a class of cases, not yet adverted to, which materi-
ally illustrates the right and powers of partners, after the dis-
solution of the partnership, and bears directly on the point un-
der consideration. In Hackley *vs.* Patrick, (3 *Johns. R.* 536,)
it was said by the Court, that "after a dissolution of the partner-
ship, the power of one party to bind the others, wholly ceases
There is no reason why his acknowledgment of an accoun

should bind his co-partners, any more than his giving a promissory note, in the name of the firm or any other act." And it was therefore held, that the plaintiff must produce further evidence of the existence of an antecedent debt, before he could recover; even though, the acknowledgment was by a partner, authorized to settle all the accounts of the firm. This doctrine was again recognised by the same Court, in Malden *vs.* Sherburne (15 *Johns. R.* 409, 424,) although it was admitted, that in Wood *vs.* Braddick (1 *Taunt.* 104,) a different decision had been had in England. If this doctrine be well founded, as we think it is, it furnishes a strong ground to question the efficacy of an acknowledgment to bind the partnership for any purpose. If it does not establish the existence of a debt against the partnership, why should it be evidence against it at all? If evidence, *aliunde*, of facts within the reach of the statute, as the existence of a debt, be necessary before the acknowledgment binds, is not this letting in all the mischiefs against which the statute intended to guard the parties: viz. the introduction of stale and dormant demands, of long standing, and of uncertain proof? If the acknowledgment, *per se*, does not bind the other partners, where is the propriety of admitting proof of an antecedent debt, extinguished by the statute as to them, to be revived without their consent? It seems difficult to find a satisfactory reason, why an acknowledgment should raise a new promise, when the consideration upon which alone it rests, as a legal obligation, is not coupled with it in such a shape as to bind the parties; that the parties are not bound by the admission of the *debt*, as a debt, but are bound by the acknowledgment of the debt, as a promise, upon extrinsic proof. The doctrine in 1 *Taunt.* 104, stands upon a clear, if it be a legal ground; that as to the things past, the partnership continues and always must continue, notwithstanding the dissolution. That however is a matter which we are not prepared to admit, and constitutes the very ground now in controversy.

The light in which we are disposed to consider this question is, that after a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. It is wholly immaterial, what is the consideration which is to raise such cause of action; whether it be a supposed pre-existing debt of the partnership, or any auxiliary consideration, which might prove beneficial to them. Unless adopted by them, they are not bound by it. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. The acknowledgment, if it is to operate at all, is to

create a new cause of action; to revive a debt which is extinct; and thus to give an action which has its life from the new promise implied by law from such an acknowledgment, and operating and limited by its purport. It is then, in its essence, the creation of a new right, and not the enforcement of an old one. We think, that the power to create such a right does not exist after a dissolution of the partnership in any partner.

There is a case in the Kentucky Reports, not cited at the bar, which coincides, as far as it goes with our own views; and if taken as a general exposition of the law, according to its terms, is conclusive on this point. It is the case of Walker and Evans *vs.* Duberry (1 *Marshall's Rep.* 189.) It is very briefly reported, and the opinion of the Court was as follows. "We are of opinion that the Court below improperly admitted as evidence against Walker, the certificate of J. T. Evans, made after the dissolution of the partnership, between Walker and Evans; acknowledging that the partnership firm was indebted to the defendant Duberry, in the sum demanded, in the action brought by him, in the Court below. It cites 3 *Johns. Rep.* 536. 3 *Mumf. R.* 191.

It does not appear what was the state of facts in the Court below, nor whether this was an action in which the statute of limitations was pleaded, or only *non assumpsit* generally. But the position is generally asserted, that the acknowledgment of a debt by one partner after a dissolution, is not evidence against the other. Whether the Court meant to say, in no case whatever, or only when the debt itself was proved, *aliunde*, does not appear. Its language is general and would seem to include all cases; and if any qualification were intended, it would have been natural for the Court to express that qualification, and have confined it to the circumstances of the case. The only room for doubt, arises from the citations of 3 *Johnson* and 3 *Mumford*. The former has been already adverted to; and the latter Shelton *vs.* Cocke & others (3 *Mumf. R.* 191,) recognised the distinction asserted in 3 *Johns. R.* as sound. These citations may, however, have been referred to as mere illustrations, going to establish the proposition of the Court to a certain extent, and not as limitations of its extent. In any view, it leads to the most serious doubts, whether the state Courts of Kentucky would ever adopt the doctrine of Whitcomb *vs.* Whiting in Douglas; especially so, as the early case in 2 *Vent.* 151, carries an almost irresistible presumption, that the Courts, at that time, held a doctrine entirely inconsistent with the case in Douglas.

Upon the whole, it is our judgment that there is no error in the decision of the Circuit Court, and it ought to be affirmed.

It is, however, to be understood that this opinion thus expressed, is not unanimous, but of the majority of the Court; and as is apparent, from the preceding reasoning, it has been, principally, although not exclusively, influenced by the course of decisions in Kentucky upon this subject.

Judgment affirmed, with costs.

THE MECHANICS BANK OF ALEXANDRIA, APPELLANTS, *vs.* ADAM LYNN, APPELLEE.

A Court of Equity ought not to decree specific performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The Court may so modify the agreement, as to do justice, as far as circumstances will permit; and refuse specific execution, unless the party seeking it, will comply with such modifications as justice requires. {382}

If a bill charges a defendant with notice of a particular fact, an answer must be given without a special interrogatory to the matter. But, a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. {383}

When a judgment debtor comes into the Court asking protection on the ground that he has satisfied the judgment, the door is fully open for the Court to modify or grant the prayer, upon such conditions as justice demands. {384}

APPEAL from the Circuit Court for the county of Alexandria.

The appellee filed his bill on the Chancery side of the Circuit Court for the county of Alexandria, in the District of Columbia, against the Mechanics Bank of Alexandria, to enjoin the bank from proceeding upon a judgment at law, which the bank had obtained against him, and upon which an execution had issued, and he had been taken and confined.

The bill stated, that the judgment which had been obtained against the complainant was for what is called, according to the bank phrase, "*an overdraw*," amounting to $1573 85; and, that after this judgment had been obtained, he had made a deed of trust to Thomas F. Mason, to secure the payment of his debts, and that this judgment against him was among the first to be paid; and also that the security provided in the deed was ample for that object.

The bill then states, that the complainant after this deed had been made, entered into a settlement with the bank of the various claims which they had against him, and agreed with them upon certain modes of payment of his debts, and among others of the judgment of $1573 85 for the *overdraw*. That this $1573 85 was to be paid out of the trust fund conveyed to Mr. Mason; and as an evidence of it, the bill refers to the account stated in the written settlement, in which the defendant Lynn is charged with the judgment for the overdraw, and credited by "the security in deed to Mason for overdraw."

The bill alleges also that in pursuance of this settlement the complainant carried into effect the terms of the said settlement, and that every thing due from him to the bank was satisfied,

except the sum of $3700, which was to be secured to the satisfaction of the bank; and that so far as respected this $3700, he had offered security, such as the committee of the bank had considered ample, and such as the bank ought to have accepted; but which they refused to accept.

The bill then alleges, that notwithstanding this settlement and the fulfilment of it, on the part of the complainant, the bank had issued an execution against him upon the judgment for "the overdraw," and had confined him in the bounds of the jail under the execution, and prayed he might be relieved from his imprisonment, and that the bank should look to the security provided in the deed of trust to Mason, and to that fund only. Upon this bill an injunction was granted, and the complainant was released from his confinement under the execution.

The appellants filed an answer to this bill, and among other things stated; that they had agreed upon a settlement with the complainant, of the various claims which the bank had upon him. That they were very desirous of securing the payment of these claims, and in order to effect the said settlement, they had given up to the complainant $784 04; and had agreed to take his bank stock and property at prices above their value; and had also agreed to take their payment for "the overdraw" out of the trust fund in Mason's hands, provided they could have had the full benefit thereof. They admit that in pursuance of this agreement, the defendant Lynn did transfer to the bank his stock and lands leaving nothing unpaid, but the judgment for "the overdraw," and the sum of 3700 dollars which was to have been secured to the satisfaction of the bank. They refer to the articles of agreement to show, that the security to be given for this 3700 dollars was to be such as was satisfactory to the Board of Directors; and the answer states that it never was secured to their satisfaction, and that no tender or offer of security was ever made, that ought to have been acceded to by the bank; and that the bank was right in refusing the security offered.

The answer also states, that as to the judgment for the overdraw, it never was satisfied, and that the deed of trust to Mason was entirely inoperative, as to this debt, and was made upon such terms that the bank could not accede to them. That their cashier, immediately after the agreement had been entered into between Lynn and the bank, had called upon the trustee, Mr. Mason, to know whether the bank might expect payment from that fund; and was informed by him, that one of the conditions of the deed was, that the creditors accepting the benefit of the deed, should within six months of the date of it, release to Lynn all claims and demands which they had upon him; that this deed had been executed on the 16th November 1820, and

that the agreement of Lynn with the bank had been executed on the 19th May 1821, so that the six months had, in fact, expired before the said agreement had been made. The trustee therefore informed the cashier, that the bank was not entitled to any benefit under that deed, and that they could not reckon upon that fund for the payment of their said judgment.

The answer then states, that the bank, finding they were not entitled to any benefit from the trust funds, and seeing no other means of payment from Lynn; had resorted to an execution upon their judgment, and he was accordingly taken in execution and remained in execution nearly a year, until it became necesary for him to take the oath of insolvency, and under these circumstances he obtained the injunction, and they prayed that it might be dissolved.

The deed of trust to Mason, bearing date the 16th of November 1820, was filed as an exhibit with the bill of Lynn the complainant. This deed has in it the following proviso, viz. "Provided always however, and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatsoever, against the said Adam Lynn; and the period of six months shall be, and is hereby, allowed them from the date of this instrument to come in, and elect and sign such discharge; and the dividend or share to which each and all of those who may refuse or neglect for the space of six months as above allowed, for that purpose, to sign and execute such discharge as aforesaid, shall go and be disposed of for the benefit of such of the aforesaid creditors as shall accept of the terms of this deed, and in the order above directed."

The agreement entered into between the defendant Lynn and the bank, was also made an exhibit with the bill. It bears date on the 29th of May 1821, and so far as respects the matter in dispute is as follows, viz.—

ARTICLE 1st. That the account of A. Lynn, with the Mechanics Bank be stated as follows—

To A. Lynn's stock note,		$15,360 00	By A. Lynn's stock,	$21,014 50	
Mrs. Buckland and Mrs. Coryton's,		125 00	Discount 10 per cent.	2,101 45	
A. Lynn's note endorsed R. Young,		11,100 00			$18,913 05
Interest on do. to 4th May 1820,		1,356 00	By Mrs. B. & Mrs. C. do.	357 50	
A. Lynn's note endorsed J. Gird,		320 00	Discount 10 per cent.	35 75	
Interest on do.		36 54			321 75
Overdraw,		1,573 85	Interest on 3553, difference between stock and stock note,		434 00
Five protests		8 75	123 acres of land at $25,		3,087 50
			House and lot,		1,500 00
			Security in deed to Mason for overdraw,		1,573 85
			Balance,		4,049 98
		$20,880 19			$29,880 19

(The Mechanics Bank of Alexandria vs. Lynn.)

ARTICLE 2d. The above balance, except $349 98, say 3700 dollars to be secured by A. Lynn to the *satisfaction* of the Board, and to be paid in one, two and three years.

Depositions were taken on the part of the bank, to prove that the committee of the bank who entered into the settlement with the defendant Lynn, were not authorized to decide upon the security which he had offered for the balance of 3700 dollars; and that they did not in fact agree to accept the security.

Upon the final hearing of the case in the Circuit Court, on the bill, answer, exhibits and depositions, the Court ordered a perpetual injunction; and, to this decretal order an appeal was entered to this Court by the Mechanics Bank.

The case was argued by Mr. Wirt, Attorney General, and Mr. Swan, District Attorney, for the appellants, and by Mr. Jones and Mr. Taylor, for the appellees.

For the appellants it was contended.—

The deed from Adam Lynn to J. F. Mason does not appear to be recorded; no notice of its contents was given to the bank, nor does it appear that the bank knew of its terms, at the time of settlement. As soon as the settlement informed the bank of the deed, application was made for the benefit of its provisions; and it was found, that by its terms the bank was excluded therefrom. 1. Because the period for executing a release had passed; and secondly because the bank could not give a general release, as the debt of 3700 dollars had not been secured. Equity will not enforce an agreement, when from circumstances subsequently discovered, it appears that the party who made the agreement was misled, or cannot receive under it, what according to its terms he expected to receive, 2 *Sch.* & *Lef.* 341. If the appellee meant to make use of the deed to Mason, he should have shown in his bill that the bank agreed to abide by it. This is not done, nor is it said by the appellee that the bank was knowing of its nature.

The debt of the appellee for "*the overdraw*," has never been paid; although the judgment for 3700 dollars may, by the result of the proceeding upon the judgment, be satisfied; the *overdraw* remains due, unless the statement in the agreement as to it, shall release the claim of the bank on Adam Lynn and oblige them to look to the deed of Mason for payment. The bank cannot place itself within the terms of the provisions of that deed.

There is no evidence before the Court that none of the creditors of Adam Lynn came in under the deed, and thus the fund to arise from that deed is closed against the bank for ever. The effect of the perpetual injunction will be to prevent any of the debt for the overdraw being collected, and give to the ap-

pellee the benefit of the concealment he practised towards the appellants.

Upon the nature, effects and power, of interrogatories in Courts of Chancery, cited, *Mitford's Pleadings*, 44. *Cooper's Equity*, 12. The decisions of the Courts of Virginia, 4 *Mumford*, 273, &c.

Mr. Jones and Mr. Taylor, for the appellee.—

The contract of the bank is not one between a creditor and a solvent debtor, having for its object on the one hand the security of the debt, and on the other, an extension of time for payment. But it is a compromise with an insolvent—of a debt, in part at least, disputed.

It may therefore be well supposed that the bank was willing to have sacrificed a part of its claim, or to have taken, as to part, an inadequate security to save the rest. The contract with Mason, approved by the Board on the 29th of May, is in all its articles executory, except as to the provision for the overdraw, the only one now in dispute. As to that, if the bank is to be considered as having agreed to receive the deed to Mason as a *payment* of this claim, nothing further on the part of Lynn remained to be done—the deed was beyond his control.

The appellee has carried into effect all the *executory part* of the contract, he has transferred his stock, conveyed his land, and moreover executed his deed of trust from Young. The bank has obtained payment of the balance of the account of 3700 dollars, so that every thing required of him by the bank has been done—they now reject the only stipulation which was particularly favourable to Lynn and onerous to them.

In deciding on the security to be offered for the 3700 dollars, the bank did not possess an arbitrary power; it was bound to act with good faith. If the security offered was sufficient, they were bound to have received it as satisfactory. Sufficient security was offered, and was approved of by the committee of the bank, and by the committee recommended to the Board of Directors of the bank.

This affords at least *prima facie* evidence that the security was adequate, and ought to have been received; it has been opposed by no evidence to negative this presumption.

But this inquiry is now unnecessary, the bank has by execution, not only enforced payment of the 3700 dollars; but they have enforced it with interest, with which, by the contract, Lynn was not chargeable.

The deed was received as an absolute payment. This may be inferred, from the suspension of proceeding on their judgment from the 29th of May 1821, the date of compromise, to July 1823, and from other circumstances. And more especially

from the terms of the deed, which annex the condition of a release to Lynn. If the bank accepted "the security in the deed to Mason" it must be in the terms of the deed. No fraud or concealment is charged on the complainant in the answer—the defendant must be presumed to be informed of the subject on which they were treating; they no where pretend, that they were ignorant of the contents of the deed to Mason; and it may be fairly presumed, that to secure nearly 29,000 dollars they would be willing to take a doubtful or even inadequate security for 1500 dollars. It does not appear that any creditors had accepted of the terms of the deed of trust to Mason, and if so, it was open to all, particularly by the very contract of 29th of May, to the bank.

Their own admissions in their answer, show that they considered the arrangement still open; they say they require nothing but the complainant's order to his trustee. This order, so far as the complainant could give it, is given by the contract of 29th of May; so far as he is concerned, the prosecution of this suit, affirms the right of the bank, under the deed of trust. But, although the release may be a condition precedent, the time is not a part of the condition, but a qualification of it,—from which a Court of Chancery, with the consent of the debtor for whose benefit it was introduced, may relieve. *Francis's Maxims, p.* 61. *max.* xxii. Richmond edition. 1 *Vernon*, 260. 319.

Mr. Justice Thompson delivered the opinion of the Court.

Adam Lynn, the complainant in the Court below, filed his bill for an injunction to restrain the Mechanics Bank of Alexandria from proceeding upon a judgment which it had recovered against him at law for $ 1573 85. A perpetual injunction was decreed, to reverse which, the present appeal is brought.

The bill and answer contain many matters not necessary now to be noticed. The grounds upon which the application for an injunction was placed, were, that on the 29th of May 1821, a settlement was made between the parties, of various matters which had been for a long time in dispute between them, among which was the judgment now in question. In the account, stated, which formed the basis of that settlement, Lynn is charged with this judgment, which is there called "the overdraw," and credited by security in deed to Mason for the same. Upon this statement of the account, there was a balance of $ 3700 found in favour of the bank, for which security was to be given. This may however be now laid out of view. For although it appears that some difficulty arose with respect to the security for this balance, yet it is alleged in the bill that

it was afterwards paid to the bank; and this is not denied, but substantially admitted in the answer. And the whole arrangement upon that settlement was carried into execution, except that which related to the judgment now in question.

It is contended on the part of Lynn, that the security in the deed to Mason was a complete discharge by the bank of this debt. And, whether it is so to be considered, is the only question necessary now to be noticed.

The deed of trust given by Lynn to Mason, bears date the 16th of November 1820; and provides in the first place for the payment of judgment creditors; then for certain enumerated creditors; and finally, the surplus to be paid to the Mechanics Bank of Alexandria in discharge of notes discounted for Lynn. This deed contains the following proviso, "Provided always and it is hereby expressly required, that each and every of the aforesaid creditors, before they receive the benefit of this deed, shall sign and execute a full and complete discharge from all claims and demands whatever, against the said Adam Lynn. And the period of *six months* shall be, and is hereby allowed them from the date of this instrument to come in, and elect and sign such discharge."

It will be seen from comparing the dates of this deed, and the settlement made between the parties, that the six months limited for the creditors to come in, and accept of the provision thereby made, had expired when the settlement took place; and the bank, therefore, according to the terms of the deed was precluded from taking any benefit under it.

The bill alleges that the provision made by the trust deed for the payment of this debt, was amply sufficient. The bank denies that the judgment has ever been satisfied, and alleges that on application to the trustee Mason, for the benefit of the provision thereby made, it was refused because the time had expired within which the creditors were to come in and accept of the benefit of it.

Was this then such a settlement and discharge of this judgment, as, under the circumstances, will conclusively bind the bank; and turn it over to this trust fund alone for satisfaction of the debt?

The complainant in the Court below, asks the aid of a Court of Chancery to restrain the bank from enforcing a judgment at law; and if this is an unconscientious request it would be inconsistent with the course of a Court of Equity to grant it.

The complainant may be considered as asking the specific execution of an agreement, by which the bank stipulated to accept in satisfaction of this judgment, the provisions made by Lynn for his creditors in the deed of trust.

But the Court ought not to decree performance, according to the letter, when from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The Court may so modify the agreement, as to do justice as far as circumstances will permit; and refuse specific execution, unless the party seeking it will comply with such modification as justice requires.

It cannot be presumed, that the bank in point of fact, knew that the time had expired within which creditors were allowed to come in and accept of the trust fund. Nor ought it to be presumed, that this circumstance was adverted to by Lynn; as it would be charging him with a fraudulent design of imposing upon the bank an unavailable security.

Whether it was available or not, is a proper subject of inquiry, under the pleadings. The bill alleges that the provision made by the deed for payment of this debt, was abundantly sufficient.

This, the answer denies; because the complainant by the limitation of the time within which the creditors were to come in, had debarred the bank of availing itself of that security, and that the trustee had excluded this debt on that account. And all that the bank requires is, that the complainant should order his trustee Mason to pay this debt out of the trust fund.

It is said, however, that the bank is chargeable with notice of this deed, and all its provisions; and has therefore accepted the fund, at its own risk; and particularly as notice is not denied in the answer.

There is nothing in the pleadings or proofs showing notice in fact, and the deed was not recorded, so as to charge the bank with constructive notice. There may be reasonable grounds to conclude, that the bank had information with respect to the trust fund before it agreed to accept it as a substitute for the judgment. But actual knowledge of this limitation cannot reasonably be presumed, as it was a fund from which no benefit could be derived; and the bill contains no charge calling upon the bank for an admission, or denial of notice. This was not required by reason of the special interrogatory put in the bill. If the bill had charged the bank with notice, an answer must have been given without such interrogatory. But a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill; (*Mitford*, 44.) and if the bank was called upon by this interrogatory to admit or deny notice, no answer having been given, exception should have been taken to the answer for insufficiency.

Nothing, therefore, appears, which would have precluded the

bank from the aid of a Court of Chancery; even was its complainant seeking relief against the conclusive operation of this settlement, when the consideration for which the judgment was to be discharged has entirely failed, and that by the act of Lynn himself. But when the judgment debtor comes into the Court asking protection on the gronnd that he has satisfied the judgment, the door is fully open for the Court to modify, or grant his prayer, upon such conditions as justice demands.

The arrangement between the parties was executory; no release or discharge of the judgment was given. The account stated was the basis only on which the settlement was made, and to be carried into execution. And it must have been the intention of both parties, that the bank should be let in to take the benefit of the trust fund. And justice requires that this should still be done, as far forth as it can be consistently with the safety of the trustee, and the rights of other creditors entitled to the benefit of that fund.

The situation of that fund, however, and what has been done under the trust deed, could not be properly inquired into, under the pleadings in this cause; and without other parties before the Court.

The proper course for the bank would have been, to have filed a cross bill against the complainant, and such other parties, as were necessary to bring that subject completely before the Court and enable it to make a final determination of the matter in dispute. If the assent of Lynn is all that is necessary to enable the bank to avail itself of the trust fund, justice requires that this should be given, before the bank is entirely restrained from proceeding on its judgment at law. And it is no doubt within the legitimate powers of a Court of Chancery, under circumstances like the present, to require such assent, and modification of the settlement, before granting a perpetual injunction.

But the rights of other creditors, which may have attached upon this fund must not be lost sight of; with respect to which however, we have not before us, the means of judging.

We are accordingly of opinion that the decree of the Court below granting a perpetual injunction be reversed. And that the cause be sent back with directions to the Court to continue the injunction, until the bank has a reasonable time to file a cross bill. And that the continuance of the injunction be subject to such further order of the Court, as equity and justice may require.

This cause came on, &c., on consideration whereof, It is decreed and ordered by this Court, that the decree of said Circuit

Court in this cause granting a perpetual injunction be and the same is hereby reversed and annulled; and it is further ordered by this Court that the cause be remanded to the said Circuit Court, with directions to continue the injunction until the bank has a reasonable time to file a cross bill, and that the continuance of such injunction be subject to such further orders of the Court. as equity and justice may require.

JOHN CONARD *vs.* THE ATLANTIC INSURANCE COMPANY OF NEW YORK.

It is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage; nor that the money loaned, should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. {436}

It matters not, at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. {437}

The lender on *respondentia*, is not presumed to lend on the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run, upon other goods; and it was not a mere contract of wager and hazard. {437}

It seems, that the common and usual form of a *respondentia* bond, is that which was used in this case. {437}

What is the nature and effect of the priority of the United States, under the statute of 1799, chap. 128, sec. 65. {438}

It is obvious, that the latter clause of the 65th section of the Act of 1799, is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. {439}

Insolvency, in the sense of the statute, relates to such a general divestment of property, as would in fact be equivalent to insolvency in its technical sense. It supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *vs.* Hooe, 3 *Cranch*, 73; and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute. {439}

Mere inability of the debtor to pay all his debts, is not an insolvency within the statute; but, it must be manifested in one of the three modes, pointed out in the explanatory clause of the section. {439}

The priority, as limited, and established in favour of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent its passing by virtue of such assignment to the assignees; but it is a mere right of prior payment, out of the general funds of the debtor in the hands of the assignees; and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States. {439}

It is true, that in discussions in Courts of Equity a mortgage is sometimes called a lien, for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law. The estate is considered as a trust, and ac-

(Conard vs. The Atlantic Insurance Company.)

cording to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute, and indefeisible. {441}

It has never yet been decided by this Court, that the priority of the United States will divest a specific lien, attached to any thing, whether it be accompanied by possession or not. {441}

The case of Thelluson vs. Smith, 2 *Wheat.* 396, turned upon its own particular circumstances, and did not establish any principles different from those which are recognised in this case. And it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States. {444}

It is not understood, that a general lien, by judgment on lands, constitutes *per se* a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. {443}

By the well settled principles of commercial law, the consignee is the authorized agent of the owner, whoever he may be, to receive the goods; and by his endorsement of the bill of lading to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interest, the latter becomes, as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by endorsement, and thus may pass the property. {445}

Strictly speaking, no person but the consignee can by any endorsement on the bill of lading pass the legal title to the goods. But, if the shipper be the owner, and the shipment be on his own account and risk, although he may not pass the title by virtue of a mere endorsement of the bill of lading, unless he be the consignee, or the goods be deliverable to his order; yet, by an assignment on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except purchasers for a valuable consideration, without notice, by endorsement on the bill of lading itself. Such an assignment by the owner, passes the legal title against his agents or factors, and creditors, in favour of the assignee. {445}

Mortgages may as well be given to secure future advances, and contingent debts, as those which are certain and due. The only question that properly arises in such cases, is the *bona fides* of the transaction. {448}

Without undertaking to suggest, whether in any case the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only, *prima facie*, a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. {449}

In cases where the sale is not absolute but conditional, the want of possession, if consistent with the stipulations of the parties, and *a fortiori* if flowing directly from them, has never been held to be, *per se*, a badge of fraud. {449}

On a trial upon the merits, it is too late to take exception to the capacity of the plaintiff to sue, this should have been done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection. {450}

(Conard *vs.* The Atlantic Insurance Company.)

A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor; was properly permitted to go to the jury, upon proof of the execution of the bond by that obligor alone; as, under the circumstances, it was *prima facie* evidence of his execution of the instrument. {451}

THIS was an action of trespass brought in the Circuit Court for the district of Pennsylvania, by the Atlantic Insurance Company of New-York, against John Conard, the Marshal of the district of Pennsylvania, for taking and carrying away certain teas, imported from Canton into the port of Philadelphia, on board the ships Addison and Superior. Pleas the general issue, and a special justification under a *fi. fa.* against the goods as the property of Edward Thomson. The suit was instituted, and tried under an agreement, which is recited in the following bond.—

Know all men by these presents, that we, the Atlantic Insurance Company of New-York, are held, and firmly bound, unto the United States of America, in the sum of forty-two thousand dollars, lawful money of the United States of America, to be paid to the said United States of America, their certain Attorneys, Successors, or Assigns, to which payment, well, and truly to be made, and done, we bind ourselves, and our successors, firmly by these presents, sealed with our seal of incorporation, and dated this ninth day of October, in the year of our Lord, one thousand eight hundred and twenty-six.

Whereas, the goods and merchandise described in an invoice, a copy of which is annexed, imported in the ship Addison, from Canton, safely arrived at the port of Philadelphia, *have been levied on* by the Marshal of the Eastern District of Pennsylvania, *by virtue of an execution on a judgment in favour of the United States, against Edward Thomson*, of Philadelphia, *as the property of the said Edward Thomson;* and, whereas, the Atlantic Insurance Company of New-York, *claim to be the owners in law, or equity, of the said goods, and actually hold the bills of lading and invoice thereof;* under which the said goods have been duly entered at the Custom House, and the duties thereon, secured to be paid according to law. And, whereas, it has been agreed by, and between, the Secretary of the Treasury, in behalf of the United States, and the said Atlantic Insurance Company, that a suit shall be instituted by the said named company, against the said Marshal, *in which the sole question to be tried, and decided, shall be, whether the United States, or the said Atlantic Insurance Company are entitled to said goods, and the proceeds thereof;* and, whereas it has been further agreed, that the said goods shall be delivered to the said Atlantic Insurance Company, without prejudice to the rights of the United States, under the said ex-

ecution or otherwise; and that they shall sell and dispose of the same, in the best manner, and for the best price they can obtain therefor, and for cash, or upon credit as they may judge expedient; and that the moneys arising from the sales thereof, deducting the duties and all customary charges, and commissions on such sales, shall be deposited by the said Atlantic Insurance Company, as soon as received from, and after the sale, in the Bank of the United States, to the credit of the President of said bank, in trust, to be invested by the said President of the said bank, in the stock of the United States, in the name of the said President in trust, so to remain, until it shall judicially and finally be decided to whom the said goods or the proceeds thereof, do in right, and according to law belong; and on the further trust, that whenever such decision shall be made, the said President of the said bank, shall deliver the said moneys, or transfer the said stock to the party in whose favour such decision shall be made. And, whereas, in pursuance of the said agreement, the said goods have been this day delivered to the said Atlantic Insurance Company of New-York, it being understood and agreed that such delivery of the goods, shall not prejudice any existing right of the said company.

Now the condition of this obligation is such, if the said Atlantic Insurance Company, of New-York, shall comply with the said arrangements, and well, and truly sell, and dispose of the said goods, and cause the moneys arising from the sales thereof, deducting therefrom the duties, charges, and commissions, as aforesaid, to be deposited in the bank, in trust, according to the true intent and meaning of the above recited agreement, and for the purposes therein set forth. This obligation to be void, otherwise to be, and remain in full force and virtue.

(Signed,) ARCH. GRACIE, Prest. [L. S.]

Attest, GEO. B. RAPELYE, Secretary of the Atlantic Insurance Company of New-York.

The facts as they appeared by the record were as follows:—On the 21st June 1825, the plaintiffs below, lent to Edward Thomson the sum of 21,000 dollars, upon *respondentia*, by the Addison, for which the following bond was executed and delivered to the company:—

Know all men by these presents, that we, Edward Thomson, of the city of Philadelphia, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, of the city of New-York, are held and firmly bound unto the Atlantic Insurance Company, of New-York, in the sum of forty-two thousand dollars, lawful money of the United States of America, to be paid to the said *the Atlantic Insurance Company of New-York*, their certain attorney, successors, or assigns, to which payment, well and truly to be made, we do bind ourselves and each of us, our and each of our

heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated this twenty-first day of June, in the year of our Lord one thousand eight hundred and twenty-five.

Whereas the said the Atlantic Insurance Company of New-York, have this day lent and advanced to the above named Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, the sum of twenty-one thousand dollars, lawful money of the United States of America, upon the goods, wares, merchandise, and specie, to that amount laden or to be laden, on board the American ship, called the Addison, of Philadelphia, whereof Hidelius is master, or which may be laden on account of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, on board the said vessel, at any time during her intended voyage hereinafter mentioned.

And whereas the said vessel is now bound on a voyage at, and from Philadelphia to Canton, and at and from thence back to Philadelphia, with the usual privileges for trade and refreshments.

And whereas the said the Atlantic Insurance Company of New-York, are content to stand and bear the risks against which the said company usually insure by their cargo policies, on the said sum so lent and advanced on the said goods, wares, merchandise, and specie, laden or to be laden on board of the said vessel as aforesaid, during the said voyage, so as the same do not exceed the term of twelve calendar months, to be computed from the day of the date of the bill of lading, viz: the twenty-first day of April 1825.

Now the condition of this obligation is such, that if the said ship laden with the said goods, wares, merchandise, and specie, do and shall, with all convenient speed, proceed and sail on the said voyage from Philadelphia to Canton, and at, and from thence back to Philadelphia, and return and come to Philadelphia, having on board the above stipulated amount in value, in specie or merchandise, as the case may be, on the respective passages, both outward and homeward, to end her voyage there, by or before the end or expiration of twelve calendar months, to be computed from the date aforesaid, and that without deviation, (the dangers and casualties of the seas excepted;) and if the above bounden Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, or either of them, or either of their heirs, executors, or administrators, shall, and do well, and truly pay, or cause to be paid, at the city of New-York, to the above named the Atlantic Insurance Company of New-York, their attorney, successors, or assigns, the full sum of twenty-one thousand dollars, lawful money as aforesaid, immediately upon the first and next return and arrival of the said

ship, at the port of Philadelphia, or at and upon the end and expiration of twelve calendar months, to be computed as aforesaid, whichever shall first happen, together with the sum of two thousand two hundred and five dollars, lawful money as aforesaid, that being the stipulated marine interest and premium, on the said loan: or if the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, or either of them, their, or either of their heirs, executors, or administrators, shall and do immediately upon the first and next return and arrival of the said vessel, at the port of Philadelphia as aforesaid, provided such return and arrival happen within the space of twelve calendar months, to be computed as aforesaid, give security satisfactory to the said the Atlantic Insurance Company of New-York, to pay at the city of New-York, to the said the Atlantic Insurance Company of New-York, their successors or assigns, the said sum of twenty-one thousand dollars, together with the said sum of two thousand two hundred and five dollars, within three months from the time of such return and arrival, with lawful interest thereupon, from the time of such return and arrival, and shall, and do well, and truly pay the same accordingly, at the expiration of the said three months; or if, in the said voyage, and before the end of the said twelve months, to be computed as aforesaid, a total loss of the said goods, wares, merchandise, and specie, by the risks against which said company usually insure by their cargo policies, shall unavoidably happen, and the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, their heirs, executors, or administrators, shall, and do well, and sufficiently abandon, transfer, and assign, to the said the Atlantic Insurance Company of New-York, their successors or assigns, all the said goods, wares, merchandise, and specie of the said Edward Thomson, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, so laden, and to be carried from the said port of Philadelphia, on board the said ship, and all other goods, wares, merchandise, and specie, which shall be acquired during the said voyage, by reason of, or from the proceeds of the said last mentioned goods, wares, merchandise, and specie, and the nett proceeds thereof, and well and truly do account for and pay, upon oath or affirmation, within four calendar months, to be computed from the time of such loss, to the said the Atlantic Insurance Company of New-York, or their successors, a just and proportionable average on all the said specie, goods, wares, and merchandise, and proceeds, if any salvage average, or allowance, shall be obtained by reason of, or upon the same, notwithstanding such loss; then this obligation to be void; otherwise to remain in full force and virtue.

It being first declared to be the mutual understanding and

agreement of the parties to this contract, that the lenders shall not be liable for any charge, damage, or loss, that may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war; but that the lenders shall be liable to losses and averages, and entitled to the benefit of salvage, in the same manner, to all intents and purposes, as underwriters on a policy of insurance, according to the usages and practices in the city of New-York; and that in like manner the borrowers shall be subject to all the duties imposed on the assured, by the usual policies of insurance, and the customs and practices of the said city.

Sealed and delivered in the presence of us,

PETER MACKIE,
CHARLES MACKIE,
To the signature of Edward Thomson,
J. H. CLINCH,
H. W. NICOLL,
To the three last named.

EDWARD THOMSON, [L. S.]
EDW. H. NICOLL, per ROBERT SMITH, at'y. [L. S.]
FRANCIS H. NICOLL, [L. S.]
FLOYD S. BAILEY, [L. S.]

At the same time the following memorandum, bill of lading, and assignment thereon, were also executed and delivered to the company:—

Whereas, it hath been agreed that the bills of lading for the goods, specie, wares, and merchandise, mentioned in the within obligation, shall be endorsed to "The Atlantic Insurance Company of New-York," as a collateral security for the loan within mentioned:

And whereas it has been further agreed, that the property to be shipped homeward as aforesaid, being the proceeds of the said loan, shall be for the account and risk of us the said borrowers, or some of us; that the bills of lading therefore, shall express the same, and shall also express that the said property shall be deliverable to the order of the shippers, and that the same shall be endorsed in blank, and shall be placed in the hands of the said "Atlantic Insurance Company of New-York," either before or on the arrival of the said ship at Philadelphia, to be held by them as a continuation of such collateral security, to the performance of which we do bind ourselves:

Now by this instrument it is expressly declared, that such endorsement, or consignment, shall not be held to exonerate the persons of the obligors, nor compel the said "The Atlantic Insurance Company of New-York" to accept the goods and merchandise, which may arrive under such bill of lading and con-

signment, in discharge of such debt; but it shall be lawful for the said "The Atlantic Insurance Company of New-York," to receive and hold the said goods, specie, wares, and merchandise, for the space of ninety days after their arrival at the port of Philadelphia.

And in case the principal, interest, and premium, in the within obligation mentioned, shall not be paid or satisfied within the said time, to dispose of the same at public auction, and to charge the obligors with the balance that may remain due, after deducting from the amount of said sales, the freight, duties, commissions, and all other just and proper charges.

Sealed and delivered in presence of us,

PETER MACKIE,
CHARLES MACKIE,
To the signature of Edward Thomson.
J. H. CLINCH,
H. W. NICOLL,
To the three last named.

EDWARD THOMSON, [L. S.]
EDW. H. NICOLL, per ROBERT SMITH, att'y. [L. S.]
F. H. NICOLL, [L. S.]
FLOYD S. BAILEY, [L. S.]

Shipped in good order and condition, by Edward Thomson, in and upon the ship called the Addison, whereof Hidelius is master for this voyage, now lying in the port of Philadelphia, and bound for Canton, seven kegs containing three thousand Spanish dollars, for account and risk of the shipper, a native citizen of the United States of America, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Canton, (the danger of the seas only excepted,) unto John R. Thomson, Esq. or to his assigns, he or they paying freight for the said goods, at the rate of nothing, with primage and average accustomed. In witness whereof, the master or purser of the said ship hath affirmed to the three bills of lading, all of this tenor and date; one of which being accomplished, the other to stand void. Dated at Philadelphia the 21st day of April, 1825.

ANDREW HIDELIUS, JR.

No. 5. [E. T.] 38 a 44, 7 kegs containing 3000 each.

An assignment endorsed thereon, dated the 21st June 1825, as follows:—

(COPY.)

For value received, I do hereby, assign and transfer to the Atlantic Insurance Company of New-York, the within bill of lading, and the specie, goods, wares, and merchandise, to be procured thereon, or thereby; and any return cargo to be ob-

tained by the within mentioned outward cargo, and specie, or the proceeds thereof, and all the return cargo to be taken on board the within named ship, by or for my account, as collateral security, according to an agreement, duly executed and adjoined to a *respondentia* bond given by myself, Edward H. Nicoll, Francis H. Nicoll, and Floyd S. Bailey, dated this twenty-first day of June, in the year of our Lord one thousand eight hundred and twenty-five, for the sum of twenty-one thousand dollars. Witness my hand and seal, this 21st day of June 1825.

EDWD. THOMSON.

PETER MACKIE,
BARCLAY ARNY, Witnesses.

The Addison sailed from Philadelphia for Canton, on or about the 21st April 1825.

On the 14th July 1825, the plaintiffs also lent to Edward Thomson the sum of 13,960 dollars upon *respondentia* by the Superior, for which a similar bond, and memorandum, and a corresponding bill of lading and assignment, were executed to the lenders. The Superior sailed from Philadelphia for Canton on or about the 6th June 1825.

There was no difference between these two operations, except this, that the entire loan of 21,000 dollars by the Addison was paid by the company to the agents of Thomson, whereas the loan by the Superior was applied, with his consent, to pay a previous loan on *respondentia* by another ship of Thomson's, which had fallen due.

On the 19th November 1825, Edward Thomson, being very largely indebted to the United States upon duty bonds, and for duties on teas not bonded, made a general assignment of all his estate and effects to Richard Renshaw and Peter Mackie, in trust for his creditors;—and on the 13th March 1826, he confessed a judgment to the United States for half a million of dollars, upon which a *fi. fa.* was issued on the same day.

In the month of March 1826, and a few days before the arrival of the Addison, the assignees of Thomson received, under a blank envelop addressed to him, a duplicate bill of lading and invoice of a shipment homeward by that vessel, for the teas in question in this suit, and delivered them to the agents of the Insurance Company. They were respectively dated the 22d November 1825, deliverable to the order of the shipper at Canton, R. Fisher attorney for John R. Thomson, and by him endorsed in blank. The invoice stated the account and risk to be for Edward Thomson. That the teas in this invoice were the returns of the outward specie in the bill of lading assigned to the company, was proved by means of the words and figure No. 5, on the homeward invoice, and the same number and figure on the outward bill of lading; which were the means con-

certed between Edward Thomson and his supercargo in Canton, to fix the identity. The original bill of lading and invoice were received by the assignees on the arrival of the Addison, and in like manner delivered to the company. In the same month Peter Mackie, one of the assignees, received from Canton, the homeward bill of lading and invoice of a shipment of teas, &c. by the Superior, dated the 2d December 1825, deliverable to his own order; and Barclay Arny, a clerk in the service of Thomson, received a bill of lading and invoice of another shipment by the Superior, bearing the same date, and deliverable to his order. These returns, being, as was proved at the trial, purchased with the specie in the outward bill of lading by the Superior, assigned to the company, the consignees Mackie and Arny, on the 22d March 1826, endorsed the papers to the plaintiffs; the rest of the shipment of 13,960 dollars, was expended for ship's disbursements in Canton.

Both shipments by the Addison and Superior were levied upon by the Marshal, under the *fi. fa.* before mentioned, on the 15th March 1826, while the ships were below in the river, and taken into his custody, where they remained until the arrangement recited in the bond of the 9th October 1826; in consequence of which they were given up.

It further appeared upon the trial, that the Addison brought with her addressed to Thomson, a general bill of lading for her entire cargo, deliverable to Edward Thomson or assigns, but not signed by the captain; and also a general invoice, stating the cargo to be for his account and risk, and deliverable to his order. The manifest which had been made out in Canton by the agent of Thomson, stated the cargo to be consigned to Thomson, and not to order; and when the agent delivered it to the captain, he told him that it was done to save him the necessity of overhauling his papers at sea, and that he might rely on it as being correct. The captain however, on receiving a letter from the assignees, upon his arriving on the American coast, examined his bills of lading, and finding that they were deliverable to order, altered his manifest in conformity. The object of these double papers, it was alleged, was to enable Thomson, after settling with the lenders on *respondentia*, as he had done upon former occasions, to cancel the particular bills and invoices; and after procuring the signature of the captain to the general bill of lading, to enter the cargo as consigned to him.

The preceding statement is all that is necessary to introduce the points of evidence and law that were raised upon the record, and which came up for revision in this Court.

The plaintiffs' counsel having offered at the trial to give evidence of the *respondentia* bond by the Addison, it was ob-

jected to, until they had proved that the company were duly incorporated according to law. The plaintiffs' counsel then gave notice to the defendant's counsel, the District attorney of the United States, to produce the bond of 9 October 1826; and gave in evidence the agreement of counsel for entering the action, wherein it was stated, that the question to be tried was, whether the plaintiffs or the United States, were entitled to the goods mentioned in the declaration or the proceeds thereof, and that the merits should be determined without further form. The bond not being produced, the plaintiffs' counsel called Austin L. Sands to prove the delivery of that bond to the district attorney, and also its contents; and began by asking him, if he was an agent of the Atlantic Insurance Company. To this question the counsel for the defendant objected, and the Court overruled the objection. To this opinion of the Court a bill of exceptions was tendered and sealed.

The bond of 9 October 1826 being then proved, the counsel for the plaintiffs contended that they were authorized, without further proof, to give evidence of the *respondentia* bond, of which opinion was the Court; and to this opinion also the defendant's council tendered an exception.

Mackie the subscribing witness to E. Thomson's signature to the *respondentia* bond, memorandum, and assignment of the bill of lading, proved the hand writing of Thomson, his own attestation, and that of Charles Mackie—and also the hand writing of Clinch and Nicoll, the other witnesses to the bond and memorandum; who resided in New-York and were not produced. The counsel for the plaintiffs then offered to read that bond in evidence, to which the counsel for the defendant objected, but the Court suffered it to be read, as the several bond of Thomson; to which opinion an exception was also tendered.

Upon the examination of A. Hidelius, the captain of the Addison, a witness produced on behalf of the defendant, the counsel proposed to ask him the following question—Did Mr. Mackie and Mr. Nicoll make out a new manifest, altering the destination of the Addison, and ask you to enter it as a true manifest at the Custom House? This question was objected to by the plaintiffs' counsel, and overruled by the Court; to whose opinion the defendant again excepted.

The defendant's counsel proposed then to ask the same witness the following question—Did you see Mr. Mackie pay money to the pilot for being first on board the Addison? Which question was objected to, overruled, and the rejection excepted to in like manner.

The defendant's counsel having then produced an original letter from Thomson to captain Hidelius, with a postscript by the assignee, giving the captain a caution in regard to his mani-

fest, proposed to ask Peter Mackie the following question—was the greater part of the letter now produced signed by Edward Thomson, and countersigned by his assignees, drafted by the District attorney? This question was in like manner objected to and overruled, and an exception taken.

The same counsel proposed to ask of Barclay Arny, another witness, the following question—Do you know how the money was applied that was borrowed on the Addison and Superior of the plaintiffs. This question was objected to, unless the application was with the plaintiffs' knowledge, and was overruled. To this opinion a bill of exceptions was also tendered by the defendant.

At the close of the argument to the Court and Jury on the law and fact of the case, Mr. Justice Washington delivered the following points, in charge to the jury.

First. That the bonds given by Edward Thomson to the plaintiffs, for securing the loans of twenty-one thousand dollars on the cargo of the Addison, and of thirteen thousand nine hundred and sixty dollars, on that of the Superior, are not invalid as marine contracts, for the reason alleged by the counsel for the defendant; that is to say, because in respect to the former, the loan was made after the Addison had sailed upon her voyage, and in respect to the latter, for the same reason; and because the bond was given by the said Thomson for securing a balance due by him to the plaintiffs, on account of preceding loans made to him, and not for money lent at the time the said security was given.

Second. That it is no objection to the validity of the bond given for securing the loan, on the cargo of the Addison, upon the ground of usury, that such cargo was known, by the parties, at the time the said bond was given, to have been in safety at and upon the departure of the said vessel from Philadelphia; since the real question for the jury to decide in relation to that subject was, whether, upon the whole of the evidence given in the cause, the loan was bottomed upon a fair marine contract, the repayment of which was to depend upon the perils which the plaintiffs assumed to bear, or whether the contract was merely a device to cover an usurious loan. If the risk be inconsiderable, or for a part of the voyage only, and the marine interest be disproportioned thereto, these circumstances may warrant the presumption of unfair conduct sufficient to avoid the contract. But the mere circumstance of the known safety of the cargo at any particular period of the voyage, or of the assumed risk, is not, *per se*, an objection to the contract on the ground of usury. If Edward Thomson was to pay interest *from a period antecedent to the loan*, there can be no question, but that the contract was usurious, and it would be so although

no more than the legal rate of interest was reserved. How that fact is, the jury must decide from the evidence before them.

Third. That the loan upon the cargo of the Addison, was by the terms of the aforesaid bond, given to secure it at the risk of the plaintiffs during the whole voyage, notwithstanding the omission of the words "lost or not lost" in the said bond; there being other and equivalent expressions in the said instrument.

Fourth. That the above bond given for securing the loan made upon the cargo of the Addison, together with the memorandum endorsed on it, the bill of lading outward, and the endorsement thereon, are all to be considered as forming parts of one entire contract; and as such, they do, upon a fair and legal construction of them, cover that part of the homeward cargo, which was the investment of the outward cargo on which the loan was secured; and that the same principles are applicable to the contract in relation to the Superior. That the above instruments, taken and construed together as forming one contract, vested in the plaintiffs an equitable title to the return cargoes of those vessels; if upon the evidence given in the cause, the jury should be of opinion, that those return cargoes were in point of fact the investment of the outward cargoes of the Addison and Superior, respectively. And that nothing remained to be done to vest in the plaintiffs the legal right to the said property, respectively, but the delivery to them of the homeward bills of lading of the Addison's cargo, endorsed in blank, and an assignment to the plaintiffs by Mackie and Arny, of the homeward bills of lading of the cargo of the Superior.

Fifth. That the equitable title of the plaintiffs, so vested in them on the nineteenth day of November 1825, when Edward Thomson made an assignment of all his property for the benefit of his creditors, was not defeated or affected by the right of preference, which that act gave to the United States to be first paid what was due to them by the said Thomson, and that this equitable title was converted into a legal one, by the subsequent delivery to the plaintiffs of the bills of lading endorsed in blank of the Addison's homeward cargo, and of the assignment by Mackie and Arny, of those of the cargo of the Superior.

Sixth. That the actual possession of the above return cargoes by the masters of the Addison and Superior, until they were levied upon under executions at the suit of the United States against Thomson, is not, *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to those cargoes.

Seventh. That as to the charge of fraud, which it is insisted by the counsel for the defendant taints this transaction through-

out, that is a subject exclusively for the consideration and determination of the jury, upon the evidence laid before them; in deciding upon which, they are to observe, First. That actual fraud must be proved, and ought not to be presumed: and, Secondly. That no fraud which may have been practised, or attempted, by Edward Thomson, his captains or agents, ought to affect the validity of these contracts; unless they should be satisfied, from the evidence, that the plaintiffs in some way or other, participated in the same.

Lastly. That if the jury should be of opinion, upon the whole of the evidence, that the transactions between the plaintiffs and E. Thomson, which constitute the basis of this action, were fair, so far as the plaintiffs were concerned in them; and that they stand clear of the imputation of usury, on the ground that interest was reserved from a period antecedent to the loan; and if further they are satisfied, that the homeward cargoes were the proceeds of the outward cargoes on which the securities were given; then their verdict ought to be for the plaintiff, otherwise not. It was further stated by the Judge that he had declined giving a construction of the 62d section of the Act imposing duties, or an opinion on the question whether under that section, the consignee of imported goods is liable for the duties on them; considering it to be unnecessary from the view which he had taken of the case.

And in explanation of the charge, the following questions were propounded by the counsel and answered by the Court.

1. The defendant's counsel requested the Court to charge the jury, that if the agreement of the plaintiffs with Edward Thomson was made with the view to deprive the United States of their duties, it was fraudulent, and the plaintiffs could not recover. To which the Judge answered, that if the agreement was made with that view, such would be the legal consequence; but that he had heard no evidence to warrant that conclusion in point of fact; but that was a subject exclusively for the jury.

2d. The Court was asked by the same counsel, to charge, that if the contract of Edward Thomson with the defendant, was to pay more than lawful interest during a period when there was no marine risk, the contract was usurious and void. To which the Judge answered, that if the contract was a cover to charge more than lawful interest, when there was no marine risk, it was usurious and void. That he did not himself understand the entries from the plaintiffs' books which had been given in evidence, but that the fact upon which the question is predicated, was proper for the decision of the jury.

3d. The Court was then asked by the plaintiffs' counsel to charge, that the parties were at liberty to agree for a marine interest greater than the legal rate for the time that the money

was exposed to marine risks, or the loan was at hazard by the marine risk of the goods, on which it was made. To which the Judge answered, that they certainly were.

To all which the defendant's counsel excepted, and the Judges sealed a bill of exceptions.

Mr. Ingersoll, for the plaintiff in error, stated, that after several years of actual but concealed insolvency, Thomson owned it on the 19th of November 1825, by the public assignment of all his property. He then was the debtor to the United States 979,102 dollars 63 cents for duties on his importations in the years 1823–4–5, which duties were due *at* the importations, though bonded with credits for future payments. Such is the doctrine of the case of The United States *vs.* Lyman, 1 *Mas.* 482. Thus the contest arose between the United States, who *loaned* these credits, and the defendant in error, who also claim reimbursement for loans; but the fund in dispute is the only resource of the United States, while the Insurance Company have the other obligors, besides Thomson, on the *respondentia* bond to look to. The United States are privileged creditors; not, as is often imputed, by prerogative, but by a lawful priority, which belongs to every sovereignty or government. Their credits on importation are loans, for which the consideration and equivalent are priority of payment, before any other creditors; and the fund in dispute proceeds from loans thus privileged. It is as just and equitable, as it is established by law, that for such loans the government should be paid before any other creditor, no matter what security he has for his debt. This principle is the privilege of every government, and as consonant with republican as with regal sovereignty. It belongs to all codes, in all ages and countries. Thus, in England before the statute of Acton Burnell, the crown had execution against the person and the lands of its debtors, which was not allowed to any subject at that time. *Plowd.* 441, 3 *Co.* 11. 2 *Bac. Abridg.* 686. Government is not bound by certificate of bankruptcy, by Act of Limitations, or to pay costs; principles common to the American as to the English law. The crown may assign a *chose in action*, and its assignee may sue in his own name. *Cro. Ja.* 179, Rex *vs.* Twine. Such was the ancient Roman law. *Wood's Inst. of the Civ. Law, b.* 3. *ch.* 1. *p.* 141. The state was preferred for all debts, and had a lien on the property of all receivers of public funds, with the right of execution from the Treasury, without any suit; which are provisions similar to those of the Acts of Congress. The modern civil law is the same: *fiscus semper habet jus pignoris. Poth. De l'hypotheque, ch.* 1. *art.* 3. *p.* 116. All are bound to pay the state before private creditors. *Grot. de Jure, B. & P. b.* 2. *ch.* 1. *sec.* 6. These principles are indispensable to good government. It is neither politic nor

permitted for the judiciary to enfeeble by construction, what the legislature has done to establish them. Neither property nor lien is asserted for the United States, but privilege to be first paid out of the insolvent debtor's effects, before any other debtor.

To this privilege however the United States superadd the advantage, which the law always allows to vigilance in the pursuit of debts. On the 11th of March 1826 they obtained judgment against Thomson; on the 13th of that month and year issued their *fi. fa.*, and on the 15th levied it on the ships and cargoes, whose proceeds are in question. Such legal and equitable positions are immoveable by any mere debtor: the defendants in error must show that Thomson had no property in the goods levied upon as his, but that it was transferred beforehand to them. This burthen of proof they undertake, and to dislodge the public priority and possession, by proving property out of Thomson, and in the Insurance Company. They claim to be, if not owners, at least creditors with qualified property by specific lien; having loaned money on *respondentia* bonds secured by assignments, endorsed on the outward bills of lading.

Use, disposition, risk, profit and loss, in short all ownership, real and ostensible, remained in Thomson throughout. The vessels were far at sea when the loans were made, so that it was physically impossible to appropriate the parts affected to the several loans. All the homeward documents were addressed under seal to Thomson, and nothing but a secret mark on one set of the double papers, enabled the assignees to deliver the respective parcels, which were levied upon by the executions of the United States, when thus symbolically and conjecturally appropriated. The contract between the Insurance Company and Thomson is to be gathered from the bond, the annexed memorandum, and the assignment on the outward bill of lading, all considered together as one instrument. The bond does not contain a single word or indication of transfer of property or specific lien, but the contrary; and it is well settled that a *respondentia* bond creates no lien, but only gives personal security. 4 *East*, 319, Busk *vs.* Fearon. The United States *vs.* The Delaware Insurance Company, MS. The memorandum annexed to the bond, is a *caveat* against the idea of property, which the lenders repel. The assignment on the bill of lading is cautiously qualified and referential, relying upon the memorandum for the meaning of the parties. By all these instruments, taken either together or separately, there is no unqualified transfer of property; no possession changed, the account and risk are kept in the borrower; no consignment to the lenders who lend their money on the promise of the borrower to place a blank bill of lading in their hands after the voyage ends, and that and then expressly, as no more than collateral security for the loan.

(Conard *vs.* The Atlantic Insurance Company.)

The lenders trust, the borrowers covenant, throughout—no more. Usually in case of *respondentia* loans there is an unqualified assignment at home, and an unqualified consignment from abroad, with separate letters of advice, orders and an entire documentary possession in the lenders: whereas here, the lenders shun every indication of ownership or possession, which are left with Thomson, to enable him by false appearances of property to get credits for duties, which the Insurance Company thus evade liability for. The 62d section of the Act of Congress, *Laws of U. S.* 3 *Vol.* 195, holds the consignee liable for the duties, notwithstanding any transfers. By clandestine transfer the lenders have a secret lien on these effects, without notice and registry, contravening all appearances, and inevitably tempting to frauds. Can an equitable right spring from so polluted a source? Can the public priority be annulled by such an equity? By mortgage, the legal title is transferred and so registered. By pawn, the thing is deposited and thus possession changed. But in this case, all but a secret hold remained with the borrower, as the very means with which to defraud the revenue. Would Chancery compel performance of such a contract? Would trover lie at common law for the property? Could the Insurance Company have taken possession of it at any time? Could not Thomson have ordered and sent it to Europe or Australasia, instead of Philadelphia? His obligation was nothing but a mere executory promise to place a blank bill of lading in the lender's hands, which promise they had no means of compelling him to keep. Indeed, the consideration for that promise was a mere contingency, inasmuch as no debt was due till the voyage ended: and then, by the bond, the lenders stipulate to accept satisfactory security for payment; which security, according to Arny's testimony, was always a mere negotiable note from Thomson.

Such was the course of dealing uniformly. No instance ever occurred of his placing the blank bill of lading in their hands. Contracting that the returns should be consigned by Thomson's foreign agent to his orders, was contracting that the property should remain in him. Such is the universal and familiar effect of such consignments, by which most of the large British shipments to this country are regulated. *Abb. by Stor.* 240. 1 *H. Blac.* 359. 1 *Wheat.* 208, St Jose Indiano. 8 *Cra.* 253. 275, the Venus. *Ibid.* 328, the Merrimack. *Ibid.* 354. 9 *Cra.* 183, the Frances. To which it may be added, that by Act of Congress every manifest must designate ownership by fixing the consignee. Section 23d of the Duty Act, 3 *Vol. Laws U. S.* 158. All bills of lading must conform to the manifest, section 30th of the same Act, p. 166; and the property, as fixed in the consignee, remains in him notwithstanding any transfer; section

62d of the same Act, p. 195. Indeed it is a principle of universal law, that possession of chattels must accompany property, 1 *Wils.* 260. Ryall *vs.* Roll. 2 *T. R.* 587, Edwards *vs.* Harben. 1 *Cra.* 316, Hamilton *vs.* Russel. Secret liens and clandestine titles, are destructive of that free mutation of property which is vital to commerce. It is not denied that property at sea may be transferred by the documents. But the question here is whether a secret title, which disowns property till third persons are involved, may be construed into force, in order to frustrate fair claims. In Coxe *vs.* Harden, 4 *East*, 241, the Frances, 8 *Cra.* 335, and Potter *vs.* Lansing, 1 *Johns.* 215, it is said, that even the account and risk, are strongly indicative of the property. In the case of the United States *vs.* The Delaware Insurance Company, *C. C. U. S. Pen. D.*, it was adjudged that a bill of lading does not transfer the property, but merely gives a right to demand it; and that a bill to order or in blank continues the property in the shipper till a consignee takes lawful possession of it. The argument for the United States, far from any encroachment on the settled doctrines of commercial law or the common law, labours, on the contrary, to uphold them against a perilous innovation by construction. Furthermore: Was not the question of property for the jury to determine? The written instruments on which the Court determined the question are no more than evidential of the parties' intention, which was a matter of fact. Such was the use made of similar written instruments in the analogous cases of Hibbert *vs.* Carter, 1 *T. R.* 748, Haille *vs.* Smith, 1 *B. & P.* 563, Barrow *vs.* Coles, 3 *Campb.* 92, Dyer *vs.* Pearson, 3 *B. & C.* 38, Maryland Insurance Company *vs.* Rudens, 6 *Cra.* 338, and Blagg *vs.* The Phœnix Insurance Company, 8 *Wash. C. C. Rep.* 5. In all these cases, the Court left the property as a fact for the jury to ascertain.

But conceding, for argument's sake, that this is a case of equitable lien or special property, that does not supplant the public priority. The lien of a judgment certainly does not. 2 *Wheat.* 396, Thelusson *vs.* Smith. What more, in this inquiry, is a special than a general lien? Either claim is but a debt secured by a pledge; and all debts are postponed to the public privilege. The instruments relied upon, all mention collateral security, which is only title to the property, not in it: not like a mortgage, which transfers the legal right, and leaves but an equity of redemption. There was no right to take possession, much less any possession given by these documents. The general lien of a judgment gives the right of taking possession by means of execution: but the right in question was no more than a right of action, which the creditor had as much without it. The three exceptions stated by the Court to the gene-

ral rule laid down in Thelusson *vs.* Smith, are all possessory, viz: sale with delivery, executions executed, and mortgage. All liens are possessory—enforceable without suit. Liens for freight, general balance of factors, auctioneers, attorneys, carriers, tradesmen, materialmen, for purchase money; all depend in having hold of the thing liable to the lien; but none of them give a property in it. Indeed the legal understanding of lien and of property, are inconsistent with each other. Loss or gain do not affect the lien holder, but the owner of the property; to whom also, any surplus belongs after satisfying the lien debt. In Blaine *vs.* the ship Charles Carter, 4 *Cra.* 320, the Court say that a bottomry bond gives no interest in the ship, but a claim upon her, which may be enforced with the despatch of admiralty process. In Seaman *vs.* Loring, 1 *Mas.* 139, Judge Story considers it of the very essence of a lien on goods that possession accompany it. In Haille *vs.* Smith, 1 *B. & P.* 563, C. J. Eyre says, the goods were set apart to remain in deposit, from which moment the property was changed. Hibbert *vs.* Carter, 1 *T. R.* 745, and Lempriere *vs.* Pasley, 2 *T. R.* 485, turned on the right of possession. But a *respondentia* bond gives no lien 4 *East*, 319, Busk *vs.* Fearon. There is no lien for demurrage. 8 *M. & S.* 205, Binley *vs.* Gladstone. 15 *East*, 547, Philips *vs.* Rodic. 2 *Rose* 355 *Ex parte* Heywood. In Hammonds *vs.* Barclay, 2 *East*, 235, lien is defined to be a right to detain for debt property placed in the creditor's possession. In Lickbarrow *vs.* Mason, 6 *East*, 25, it is called a qualified right to be exercised over another's property. In Wilson *vs.* Balfour 2 *Camp.* 579 it is defined a right to hold. In Hallet *vs.* Bausfield, 18 *Vez.* 188, it is called the right of a party having possession to retain it. In Heywood *vs.* Waring, 4 *Campb.* 291, a right to hold. In Wilson *vs.* Heathen, 4 *Taunt.* 642, lien, or the right to hold, is contradistinguished from pledge, which is said to be matter of special contract. Lien is no more than a right of set off, being the same in equity as at law, 2 *T. R.* 492, Lempriere *vs.* Pasley. It is a claim with possession, either personal, as by bond, covenant or contract; or real, as by judgment, statute, or recognisance. *Termes de la Ley* 427. It is a right *in rem* but not *ad rem*: a claim, with hold, but without property, in the thing held.

Justice and necessity originated liens. Policy and convenience have increased them. But of late Courts lean against them, and will not add to their number or extent, 7 *East*, 229, Rushforth *vs.* Hadfield. No Court in England has acknowledged a new instance of lien for the last twenty years, 9 *East*, 426. The civil law abounds with liens, therein termed privileges; that is, prior rights of payment; such as the lien of the state for its debts, the lien of mechanics and workmen, and of lenders of money, *Wood's Inst.*

220. The common law, the admiralty law, and the statute law, are familiar with various liens. The right of landlords to distrain may be considered a lien. But these privileged claims, though all specific, and affecting the property (with notice) in all hands, wherever transmitted, were never held to give or change property. Its risk, diminution, enhancement, and disposition, are all the debtors, not the creditors; at the debtor's death, it is his assets. If Thomson had died when he became insolvent, his administrators would have taken the fund in dispute, and must have paid the proceeds to the United States. 2 *Cra.* 390, Fisher *vs.* Blight.

The whole question turns on the possession; for without possession there can be no lien. Jones *vs.* Pearle, *Stra.* 556. *Ex parte* Shank, 1 *Atk.* 254, Kruger *vs.* Wilcox, *Ambl.* 252. *Doug.* 97, M'Coombie *vs.* Davis, 7 *East*, 5. Now possession, once parted with, puts an end to lien, Sweet *vs.* Pym, 1 *East*, 4. Indeed actual possession, without the assertion of legal right to it, is of no avail, 4 *Wheat.* 438, The General Smith—And slight circumstances will be laid hold of to show that the creditor does not rely on lien, 12 *Wheat.* 611, Ramsey *vs.* Allegre. No possession was ever taken or asserted by the Atlantic Insurance Company. They repudiated it, together with every sign of ownership, lest they should be called on for the duties. They were content to be creditors with mere hypothecation, without deposite or pawn, 2 *Black. Com.* 159. Whether even pawn gives property, is doubtful: but it is unquestionable, that hypothecation does not. The latter gives but right of action. *Wood's Inst.* 219, ch. 2, b. 3. *Poth. de bienf.* Vol. 2. p. 355. *Nantissement*, ch. 1. art. 1. sec. 2. True, ships at sea may be delivered by bill of sale *ex necessitate*, 2 *T. R.* 462, Atkinson *vs.* Maling; and cargoes, may change hands by the documents. But without delivery of some kind, the whole is fraudulent and void. Ryall *vs.* Rolle, 1 *Wils.* 260, and 1 *Atk.* 167. Brown *vs.* Heathcote, 1 *Atk.* 160. Falkener *vs.* Case, 1 *Br.* 125. In this case Kenyon gave up the ships because not delivered. See his argument in Lempriere *vs.* Pasley, 2 *T. R.* 485, 496. By the civil law, a chattel cannot be hypothecated or mortgaged. And as between the state and a creditor by hypothecation, the public privilege prevails. *Domat*, b. 3 *Tit.* 1. sec. 2. p. 356–7. In the case of the Frances, 8 *Cra.* 418, it was settled that liens for loans, advances, general balance, or any thing but freight, yield to the pre-eminent law of prize; which is as near as may be the principle in question. It has also been adjudged that the lien of a foreign attachment, by which the thing attached is taken into possession, is superseded by the public priority, 5 *Cra.* 289. Harrison *vs.* Sterry—2 *S. & R.* 221, Willing *vs.* Bleecher. In Thelusson *vs.* Smith, the Court, though they men-

tion mortgage as an exception to the general rule, yet do so only, *obiter*, nor has it ever been adjudged that even a mortgage will dislodge the public priority. No lien is pretended for it. But an equitable title to these funds, much better founded in justice than that of the Insurance Company, whose asserted lien, without possession or property, is a mischievous taint secretly affecting the right to the fund, and most disastrous in its influence on free and fair circulation. To sustain it judicial legislation must add to the catalogue and character of liens, and abrogate the Act of Congress providing for the public priority.

The three first divisions of the charge, affirm the bonds in question, whose validity is denied either as *respondentia* bonds, or *bona fide* obligations. They were executed long after the ships and cargoes were at sea, not predicated of any maritime necessity, to make provision for foreign voyages; but were part of a general scheme of gambling and usurious speculation. In form, character and substance they differ from all *respondentia* bonds heretofore known. 2 *Marsh. on Ins.* 827. 8 *S. & R.* 138. The Pennsylvania Insurance Company *vs.* Duval. It is said in the *Consolato del Mare*, that Demosthenes gives us the form of a *respondentia* bond, precisely as used ever since. *Boucher's Translat.* 1 *vol.* 1 *ch.* 6. And the principles and regulations of the Roman *pecunia trajectitia*, are familiarized by abundant publications. From no source of legitimate information, can such a contract as the present derive support. All the English authorities, Molloy, Beawes, Weskett, Postlewaite and Park, like the Roman law, concur in considering *respondentia* loans, as to begin before the voyage begins, and to be warranted only by its necessities. Roccus is explicit to the same point. *Ingers. Translat. note* 75, *p.* 136. Pothier does not notice the distinction. Emerigon and Valin, may perhaps be quoted as contrary, and Marshall inclines to their opinion. 2 *Marsh. on Ins.* 747. Bynkershoek's well known chapter on this subject, also leaves his opinion in doubt. *Quest. jur. priv. lib.* 3. *ch.* 16. But the origin and reason of the contract, argue conclusively the necessity of confining it to loans before the voyage begins, and to make it begin. Otherwise, as in this instance, the loan never was at risque, nor at sea at all, nor were any purchases made abroad with the proceeds of it. Though the terms of the bond are *at and* from Philadelphia, yet the money was not loaned till the vessels were half way to China: and it will be as lawful to borrow money on *respondentia* after the vessel's return as before her departure if such devices are sanctioned. They are mere wagers without interest. The vessels, cargoes, voyages, and risks, together with the ocean, and the foreign destination, are mere dramatic suppositions. No risk was run to justify marine in-

terest. By the original doctrine, the lender at marine interest accompanied the loan in the vessel and superintended its returns: and so he must now; not perhaps in person, the improvements in modern navigation have rendered his actual presence unnecessary—but by correspondence, documents, foreign agents, supercargoes, self-appropriated consignments, and all the securities which have attended every *respondentia* loan, till these innovations were attempted. Without such precaution it is mere trust, without other than personal security. In France every *respondentia* contract, must be registered within ten days on pain of nullity. The whole ground of *respondentia* is encroached on the common law; and Courts of Justice should look well to the landmarks, which none but legislators should change; and they cautiously, if at all. Otherwise, all the gambling adventures of profligate speculation, will be legalized, all the wholesome restraints on usury abated. There can be no marine interest without, first, absolute need; secondly, a want of all other means of supply; thirdly, it must clearly appear that the loan was applied to the very voyage created by it; and lastly, there must be a sea voyage in which that very loan is risked. It is all *strictissimi juris*. Now there was no consideration for this loan till the voyage ended, till when the lenders insured the borrowers against all sea risks: and those risks were half run before the loan was made. By the law of New-York, which governs this contract, the slightest infusion of usury vitiates and annuls the whole contract. 3 *Johns. Cas.* 66, 206. Wilkie *vs.* Rosevelt. 2 *Cow.* 678. N. Y. Firemen's Ins. Co. *vs.* Ely. *Ib.* 712. Bank of Utica *vs.* Wager. *Ib.* 770. Same *vs.* Smalley. It will be said, that this was left as a question which the jury have settled. The reply is, that though that may be so, yet the Court should have also left it to the jury to determine whether the whole transaction was not a gambling and fraudulent speculation; of which the loan, bond, supposed sea risk, and marine interest, were but parts of the contrivance and collusion.

Of the points of evidence ruled, the 1st and 2d concern the corporate existence of the company, which not having been proved as usual, was allowed to be inferred from the circumstance of the collector's having accepted their bond, with the approbation of the district attorney. But those officers cannot give away the rights of the government; nor should their courtesy, at all events, be construed into such concession. The 4th, 5th, 6th, and 7th points respect evidence of fraud overruled, because it was not first brought home to the Insurance Company. The plaintiff in error strove to prove the whole scheme, the double papers, falsified manifests, altered letters—in short all the fraudulent manœuvres; conceiving it competent to connect the company with these acts, either afterwards or inferentially.

of which the jury were to determine. Lastly the attempt to prove what became of the money loaned, after proof that none of it went to Thomson's pocket, was also deemed proper as part of the whole *rerum gestarum*, for the consideration of the jury.

Binney for the defendants in error.—

The record presents questions of very different degrees of importance, some of them being without the least influence on the final decision of the cause, while others must decisively rule this controversy, as they will also rule other suits now depending, and an immense amount of property. The same time and attention are not to be given to these unequal questions; but some attention is due to the least, since the counsel for the United States have raised them for discussion.

It is proper first to dispose of those which have no connexion with the merits of this controversy:—*the exceptions to evidence admitted and rejected.*

1. Overruling an exception by the defendants' counsel, to a question by the plaintiffs to their witness Mr. Sands, as to his agency in their behalf. The question was merely introductory to the inquiry, whether he had not delivered the bond of 9th October 1826 to the District attorney. But had his agency been a material fact, he was competent to prove it. There was nothing to show that his power was conferred by writing, nor was it necessary that it should have been so conferred. A corporation may create an agent by parol, and the agent may prove it. Mifflin *vs.* Nicholson, 2 *Yeates*, 38. Bank of Columbia *vs.* Patterson's Administrators, 7 *Cranch*, 308. Bank of the United States *vs.* Dandridge, 12 *Wheat.* 69.

2. The objection to evidence of the *respondentia* bond, because the corporate capacity was not proved, was contrary to the agreement on which the suit was brought. The United States were precluded from questioning the plaintiff's right to sue as a corporation. They compelled the plaintiffs so to sue, and took their bond under their corporate name and seal to insure the suit. The cases of Henriques *vs.* The Dutch E. I. Co. *Ld. Ray.* 1535, and Duchess Manufactory *vs.* Davis, 14 *Johns.* 238, are analogous. The arrangement was at least *prima facie* evidence of charter, upon this trial, between these parties. The objection under any circumstances would have been without weight—for it was a mere question of the order of proof, which the Court was competent to regulate at its pleasure. The bond might as well be proved before the charter, as the charter before the bond.

3. That the bond was well proved, as the several bond of Thomson, admits of no doubt, unless it is meant to question the proof, because the witness swore to the signing, and not to the sealing. But, as the bond purported to be *sealed* and *delive*

ed, proof of signing was sufficient to go to the jury. Talbot *vs.* Hodson, 7 *Taunt.* 251. Curtin *vs.* Hill, 1 *Southard*, 148. Long *vs.* Ramsay, 1 *Serg. & Rawl.* 72. *Phill. on Evid.* 413.

4. Overruling the question in regard to the application of the money loaned upon the Addison, was in conformity with settled law. The question of application by the borrower, did not concern the lender, by the principles of either the common or the maritime law. By the common law, the borrower was competent to dispose of it at his pleasure. The application of a loan does not affect either the debt or the security given for it. The maritime law, as to this species of loan, is the same. The doctrine of application arises only where the master *hypothecates*, not where the owner *bottomries*, or borrows on *respondentia*. Even in the former case, though a necessity for the advance must be shown, the application does not concern the lender, unless there be a misapplication by collusion with him, or with his privity. 2 *Emerig.* 440. 502. 562. 1 *Valin*, 454. 2 *Valin*, 9. *art.* 7. *Pothier.* 257. Canzanares *vs.* Brig St. Trinidad, *Hopk. Adm. Dec.* 35. The Jane, *Dodson*, 465.

5. The remaining exceptions to the rejection of evidence, may be dismissed with the remark, that the offered testimony concerned the acts and declarations of persons, between whom and the plaintiffs there was no privity, and after the plaintiffs' title had accrued.

The more material exceptions concern *the charge of the Court*, in which are to be found the principles of law, by which the title of the plaintiffs to the property in question, is to be maintained.

The cause turns upon the decision of the Court, that a contract of insurance loan made with the owner of merchandise, *after it has departed on a voyage*, and reserving a marine interest, is not invalid, for that cause, as a marine contract; neither is it so, if it *be a renewal of a previous loan of the same nature;* and that if there was neither gambling, usury, nor fraud, but the transaction was fair, and there was a real risk, the papers in question created a trust in the specie outward and in the proceeds homeward, for payment of the loan, which gave the plaintiffs a title superior to the priority asserted for the United States.

Under the facts submitted to the jury, who by their verdict have negatived all actual fraud, gambling, and usury, and have affirmed the reality of the risk, and the fairness of the entire transaction, it is contended that these contracts were valid, and passed an effectual title to the property. 1. By the common law. 2. By the maritime law.

1. By the common law. Without at present giving a name to these contracts, it may be safely asserted, that all their ele-

(Conard *vs.* The Atlantic Insurance Company.)

...s are sanctioned by well settled principles. The contracts ...lve an advance of money at a premium beyond the rate of ... statute, dependent for its return on the result of a real risk, ... a risk in which the borrower had an interest to the whole ...xtent of the loan,—an assignment of the goods at risk, to se... ...ure the payment of principal and interest on the happening ... of a contingency,—and a continuance of the actual possession ... the goods assigned with the agents of the borrowers, until ... the purposes of their employment were answered, and they re... ...turned within the reach of the lender. All these features of the ... contract, are of indisputable legality and efficacy.

The excess of the premium, beyond the rate of the statute, has ... the sanction of the law, as the return of the *principal*, and not that ... of the interest only, depended upon a real and not a colourable ... contingency. Notwithstanding the dispositions of the Courts ... of Westminster Hall to enforce the statute of usury, it has ... been settled with the most harmonious consent, that if the prin... ...cipal and interest of the loan be at hazard upon a real contin... ...gency, it is not a case for the imputation of usury. Mastin *vs.* ... Abdee, 1 *Show.* 8. Sharpley *vs.* Hurrell, *Cro. Jac.* 507. Redingfield *vs.* Ashley, *Cro. Eliz.* ... *vs.* Tremayne, *Cro. Jac.* 507. Redingfield *vs.* Ashley, *Cro. Eliz.* ... 741. Sayer *vs.* Glenn, 1 *Lev.* 54. Appleton *vs.* Brian, 1 *Keble*, ... 711. Murray *vs.* Harding, *W. Black.* 859. 3 *Wils.* 390, *S. C.* ... It is on this principle that contracts of *post obit* and annuity ... are allowed. Battey *vs.* Lloyd, 1 *Vern.* 141. 2 *Equ. Abr.* 275. ... Chesterfield *vs.* Jansen, 1 *Atk.* 301. Such cases are not con... ...tracts of *loan*, but of insurance on hazard. They are placed ... by the civil law in the class of aleatory contracts. They may ... be gambling, but cannot be usurious.

In this case they were not gambling, because the borrower ... had an interest in the risk to the whole extent of the loan. This ... relieves the Court from the embarrassment, that would attend ... a gambling insurance. In New-York, where the contract was ... made, such a wager is lawful. Clendenning *vs.* Clark, 3 *Caines*, ... 141. They follow the English doctrine, prior to the 19 G. 2. ... c. 37. Crawford *vs.* Hunter, 8 *T. R.* 23. Massachusetts is ... the other way; Amory *vs.* Gilman, 2 *Mass.* 1; and Pennsyl... ...vania agrees with her. Pritchet *vs.* Ins. Co. N A. 3 *Yeates*, ... 461.

'The assignment of a security for the repayment of the ad... ...vance and interest on the happening of the contingency, has ... been seriously questioned on the very ground of the contingen... ...cy. There is no authority for this. Security may be given a... ...well for a contingent, as for a certain debt. It does not chan... ...the nature of the hazard or of the loan. The assignment tra... ...fers the title to a chattel, as a collateral security for the perfo... ...ance of the borrower's duty, if the goods escape the haz...

and this has the sanction of law in analogous cases. It is of the very nature of bottomry or hypothecation to give a mortgage upon the vessel; yet it is upon the contingency of her safety, that the loan is made returnable. The same is true of *respondentia*, by the law of France. Analogous securities have been given in England without question. Redingfield *vs.* Ashley, *Cro. Eliz.* 741. Batty *vs.* Lloyd, 1 *Vern.* 141. The lender is not obliged to run the risk of the borrower's insolvency, as well as of the seas.

The property in the goods was transferred by the assignments on the bills of lading, without delivery of actual possession, which was neither according to the agreement, nor within the power of the parties before the arrival in Philadelphia. They are assignments in trust on their face, according to the agreement, and are therefore honest assignments, as they tell the whole truth. The counsel for the United States think they should have been unqualified or absolute, and that they are vitiated by the account and risk continuing for Thomson. Had the assignment been absolute, on its face, there must have been a purchase, or a secret trust. The lenders did not mean to be the absolute owners, nor to conceal their interest. The account and risk, were to continue in Thomson, for his was to be the profit and loss; and the property was to be in the company in trust, for securing the debt. This was precisely Haille *vs.* Smith. 1 *Bos. & Pull.* 570. It is perfectly immaterial whether the assignments passed an equitable or a legal title. The Circuit Court thought it an equitable title only; and it certainly was a title, that an endorsement of the bills of lading by the supercargo to a *bona fide* purchaser, would have defeated. This however is owing to the confidence which the law, for the sake of commerce, authorizes a purchaser to place in this document, and not because the assignment passes the equitable title. The weight of authority and principle are in favour of its passing a legal title to the specie outward, and to the returns. 2 *Holt on Shipp.* 72. Meyer *vs.* Sharpe, 5 *Taunt.* 80. Giles *vs.* Nathan, 5 *Taunt.* 558. Beyond doubt no substantial property was left in Thomson, that any creditor could obtain by administration, assignment, or execution, except the resulting or remaining interest, after satisfaction of the bond. Whether this was legal or equitable it is needless further to inquire.

The non-delivery of possession was, under the circumstances, of no effect. It was not intended to be taken by the borrower, until the voyage was at an end. This appears by the memorandum of the agreement, and answers the objection. The possession of chattels by the assignor or his agents, after an assignment which provides for such a possession, is *per se* no objection: the possession is according to the deed. If the deed

be absolute, and purport to transfer the possession, the impossibility of taking it, by its absence at sea, or for any other cause, is an answer to the presumption of fraud, that might otherwise arise. Cole *vs.* Davis, 1 *Lord Ray.* 724. Meggott *vs.* Mills, 1 *Lord Ray.* 286. Brown *vs.* Heathcot, 1 *Atk.* 160. Flyn *vs.* Mathews, 1 *Atk.* 185. Atkinson *vs.* Maybury, 2 *T. R.* 462. *Ex parte* Batson, 3 *Bro. C. C.* 362. *Coote on Mortgages*, 263–4. In this case there was both a provision for possession by the agents of Thomson, until the return of the adventure to the United States, and an impossibility of taking possession, had the agreement called for it. It is in all respects the same case as Bucknel *vs.* Royston, *Prec. Chan.* 289, in which the title of a lender on a similar assignment for security, was traced through successive voyages, sales, and shipments, during several years, and enforced against the personal representative of the borrower.

It was not for the Court to let the jury decide the question of property, as inferable from the fact of possession. The fact of possession did not stand alone, but was governed by written instruments which legally made that fact of no importance. The jury were not prevented from deciding the question of fraud, as *connected* with the fact of possession, but they were deprived of the right of inferring it from mere want of possession, because it was a question of law, that under such circumstances of inability, agreement, and contingent debt, possession by the assignor, was not *per se* a badge of fraud.

The property then being passed to us, and passed as openly as transfers of chattels at sea are ever made, it is submitted, that the priority acts do not affect us. The case is not placed by the Circuit Court on the ground of lien; it need not be so placed in this Court. It is of no importance whether a general, or even specific lien, will prevail against the priority of the United States. Thelluson *vs.* Smith, 2 *Wheat.* 426, is a difficult case. The case of a master with the possession of goods and his lien for their freight, the possession and lien of a factor for his advances and commissions, would be more difficult, if it be true that the priority of the United States is to defeat these securities. This it is apprehended will never be decided. The United States have no rights but as a creditor. They derived nothing from their execution and levy on these teas. If they were not ours by the assignment on the bill of lading, they passed to Thomson's general assignees by his assignment of the 19th November 1825. The United States can claim only as a creditor, against the assignees who are trustees for all the creditors, and for the government first before all; but what the assignees cannot overthrow, be it specific, or be it general lien, is secure against the government. For the present cause this discussion

is however unnecessary; for here is more than lien of the highest kind; a transfer and conveyance of property, by terms of grant of the most decisive import,—a mortgage or deed of trust, upon the efficacy of which to exclude the priority of the United States, this Court have already passed their judgment in The United States *vs.* Hooe, 3 *Cranch*, 73. It is a security saved also by Thelluson *vs.* Smith. There can be no difference between a mortgage of chattels and one of land.

Thus stands the case on the principles of the common law. But the point mainly and almost exclusively pressed below, was, that although this might be so according to the rules of the common law, yet that these were loans at marine interest, a *technical* contract, which the maritime or universal law did not permit, under the circumstances of this case. On the contrary, it is submitted that—

2. These contracts are equally effectual by the maritime and universal law.

The objections urged against them are two: 1. That both the loans were made upon goods already at risk by the departure of the ships: 2. That the loan by the Superior was applied to pay a former loan, or was in other words a renewed loan.

1. The first objection is supposed to be derived from the Roman law, which it is suggested limited this contract under the name of *pecunia trajectitia*, to such loans as were themselves to be transported, or were applied to purchase goods for transportation. The language of the digest is, "*trajectitia ea pecunia est quæ trans mare vehitur. Cæterum si eodem loci consumatur, non erit trajectitia. Sed videndum, an merces ex ea pecunia comparatæ, in ea causa habeantur; et interest, utrum etiam ipsæ periculo creditoris navigent, tunc enim trajectitia pecunia fit.*" *Digest lib. 22. tit. 2.*

The Roman law upon this subject is misapprehended. Whatever is said upon this subject in the *Code*, the foundation of that law, is as a regulation of the rate of interest, without any definition of the contract, or any limitation of it. Any contract attended by the risk of transportation by sea, was within its principle. That which the *Digest* contains in regard to it, is not a limitation but an illustration of the contract; and both in the *Digest* and *Novels*, the illustrations given show that the asserted limitation was unknown to the Roman law, and that any loan dependent for repayment upon the safety of goods at risk, was within the rule of *pecunia trajectitia*.

The *Code* under the title *de Usuris*, does not define the contract, but limits the parties *in trajectitiis contractibus*, to 12 per cent. as the maximum interest. Under the title *de nautico fœnore*, it does not describe what shall not be a *contractus trajectitius*, but it defines the events in which maritime interest shall cease.

or shall not accrue, and in what event the creditor shall lose his money, or shall receive it though the goods be lost. The subject is left here by the Code.

The description of the contract is first given in the *Digest*, from the works of the civil lawyers. The passage above cited is taken from *Modestinus*, who was of opinion that the principle of the code in regard to *pecunia trajectitia*, was applicable to a case in which the merchandise bought with the loan, was transported by sea at the risk of the lender. But the distinction in the view of the Digest was not between goods bought, and goods not bought with the loan, but between a loan on goods transported at the risk of the lender, and a loan without any risk whatever: for this is the only sensible distinction in a title of the law which had reference to the rate of interest. It is accordingly made plain by the opinion of *Scævola*, Digest, Lib. 22. tit. 2. sec. 5. *Periculi pretium est*, et si conditione quamvis pœnali non existente recepturus sis quod dederis, et insuper aliquid præter pecuniam, si modo in aleæ speciem non cadat: veluti ea, ex quibus conditiones nasci solent, *ut si manumittas, si non illud facias, si non convaluero*, et cætera. Nec dubitabis, si piscatori erogaturo in apparatum, plurimum pecuniæ dederim, *ut si cepisset, redderet;* et *athletæ*, unde se exhiberet, exerceretque, *ut si vicisset, redderet.* If a contract by an *athlete* to return a loan with its interest, upon his gaining the prize, was within the rule of a *contractus trajectitius*, as is here asserted, it is obvious that this rule comprehended a loan on goods already exposed to the risk of the sea. The same is equally obvious from the language of *Paulus*. Dig. lib. 22. tit. 2. sec. 6. Fœnerator, pecuniam usuris maritimis mutuam dando, *quasdam* merces in nave pignori accepit; ex quibus, si non potuisset totum debitum exsolvi, aliarum mercium aliis navibus impositarum, propriisque fœneratoribus obligatarum, si quid superfuisset, pignori accepit. The question he asks, and answers in the negative, is whether the goods being lost on which the creditor loaned specifically, and being of value equal to the loan, he could resort to the surplus of the other loans, for repayment; and nothing can show more decisively the practice of loaning on goods generally, after the modern practice, than such a question.

The custom of merchants in the time of Justinian without doubt embraced *respondentia* loans for successive voyages, where the goods were repeatedly changed. *Novel* 106. In this Constitution of the Emperor the practice is detailed at length, and confirmed. Such a practice shows that the transportation of the specific loan, or of the specific goods bought with it, was no necessary part of the Roman law of *respondentia*.

The just inference is, that it is only the *element* of the contract that is stated in the Digest, and not its limitation, name-

ly, that the goods, on the security of which, or for which, the loan is made, shall be at the risk of the lender; but not that they should be the specific loan, or its investment.

The practice of modern nations is free from all obscurity on this head. They sanction, with great harmony, *respondentia* loans made after the goods are at risk. Upon this point the two distinguished commentators, Valin and Emerigon agree. The difference between them is upon an independent point, whether a loan made after the departure of the goods, is attended by a right to participate with prior loans, as if all the lenders were co-mortgagees—a question of no application in this cause. 2 *Emerig.* 382, 385, 386, 484. 1 *Valin*, 366. 2 *Marsh.* 747. *a.* 2 *Emerig.* 401.

2. That a renewed loan, like that by the Superior, is free from objection, is clear from many authorities precisely to the point. 2 *Emerig.* 573. *Pothier*, 259. 2 *Valin*, 11, 12. *Le Guidon*, 87. ch. 19. *Ordenanzas de Bilbao*, *cap.* 23. *Code de Commerce*, *Art.* 323.

A shorter answer to both these objections, is that the law of *respondentia* loans, is not a universal law. The contract is not one of universal nature and form, but depending upon the pleasure of the parties, and varying in different countries, according to the prevalent sense of expediency, and the principles of the code of particular law there in force. 4 *East*, 319. Bush *vs.* Fearon. 8 *Mass.* 348, Appleton *vs.* Crowninshield. No statute in this country restrains it; it is a beneficial contract; and all its provisions being sanctioned by the common law, that law alone is the standard of the contract in this Court.

Mr. Binney concluded his argument, by applying the principles contended for to the specific points of the Court's charge.

Mr. Webster, also for the defendants.

The question in this case is important, but perhaps not difficult. The transaction out of which it arises, is one of a commercial character. The United States are large creditors of Edward Thomson, and they have no other hope of attaining payment but from success in this case. But the character of the case is not altered by this circumstance; as the defendants are not answerable for the frauds of the debtor to the United States, nor for the neglect of the officers of the customs. They had no connexion with the custom house, in the course of the transaction now before the Court. Nor is there any thing in the argument that the defendants have other security for the debt due to them, by a resort to the co-obligors on the *respondentia* bond; all those persons are insolvent; and if they were not, the defendants assert, as they of right may do, their claim to their own property.

(Conard *vs.* The Atlantic Insurance Company.)

The United States are said to be privileged creditors. They are so, as far as the law goes, but no further. In this case they have no privileges, and they stand in relation to the property in controversy, like any other execution creditors of their debtor.

Thomson assigned in November 1825. All he had passed to his assignees, and the priority of the United States exists only to payment out of the fund which passed to the assignees. The law of the United States gives an action against the assignees, but it does not prevent the property from passing under the assignment.

What is the priority which the statute gives to the United States? It is not a prerogative, superseding the titles of others to property. It does not extend the rights of creditors on property. It is, what it purports to be, a *priority* among creditors, a right of first payment out of the common fund. The United States are creditors, and at the head of the list; they are *primi inter pares;* and no more.

Two propositions may be maintained; First. The priority does not affect the transfer of property at all. It never attaches on lands or goods, as lands or goods of this debtor. It arises only:

1st. In bankruptcy—2d. In cases of conveyances to assignees—3d. Against executors and administrators—and in all those three cases, it attaches in the *fund*, and not on the *specific property.*

It does not operate to prevent the passing of the property either to assignees in bankruptcy; or to assignees under a conveyance; or to executors and administrators. It amounts only to a right to previous payment out of the fund then in the hands of others.

The language of the statute, sect. 65, fully establishes those positions—assignees in bankruptcy—assignees in insolvency and executors and administrators, are all ranked together. What is law for the one, is law for all. The words are "the United States shall be first satisfied;" obviously out of the estate. The provision, making the persons holding the estate personally liable, is then introduced to operate in the event of their not satisfying the debt of the United States, *out of the estate of the debtor.*

Now, will it be contended that in regular bankruptcy, the United States could levy on property which had passed to the assignees, or that this could be done on the estates of insolvents, or of deceased persons in the hands of trustees, or executors? The correlative words of the statute, in which priority is given to the surety who pays the debt due to the United States are, that he is to be paid "out of the estate and effects of such insol-

vent, or deceased person." These words confirm the construction assumed for the defendants.

The 63d section of the bankrupt Act of 1799, ch. 4, also confirms this construction. It makes no new provision; but declares the payment shall be made out of the fund, and refers to the previously existing Act.

It is plain, upon the fair construction of the statute, that it is priority on the fund. It says the right shall exist, *when the debtor has assigned his property.* This is a different thing from saying, that his property has vested in the United States, and shall not be deemed to have passed by the assignment.

It may also be well observed, that connecting the priority of the United States, with executors or administrators, who can only be responsible, for the property which may come into their hands; and giving a personal action against assignees in case of default in paying over the funds in their hands, are conclusive evidence to show that the understanding of law is, that all the property of the debtor passes by the assignment.

There is no decided case in opposition to these principles, unless that of Thelluson *vs.* Smith, may be so construed.

Few cases have been presented to the consideration of Courts of the United States, upon this subject. They are:

1. Fisher *vs.* Blight, 2 *Cranch*, 358, which decides two points. 1. That the priority extends to debtors, generally, under the Act of March 3d 1797.—2. That it is not in the nature of a lien on the property.

2. The United States *vs.* Hooe, 3 *Cranch*, 73, which decides 1. That priority is not a lien, a principle always to be recollected—2. That to create a case, where in case of insolvency the priority will attach, there must be an assignment of *all* the property of the debtor.

3. Prince *vs.* Bartlett, 8 *Cranch*, 431, which decides that the insolvency is not a mere inability to pay, but must be some notorious Act.

4. The United States *vs.* Bryan & Woodcock, 9 *Cranch*, 377, which only says the priority given by the Act of 1797, does not apply to debts due before the passing of the law.

The case of Thelluson *vs.* Smith, 2 *Wheat.* 396, does not apply to the present case. The sale which was made by the marshal of the United States, under the judgment against Mr. Crammond, was not objected to by the assignees. The point was not made, and the assignees suffered the estate to be turned into money, and let the parties contend afterwards for their respective rights. It is obvious, that if the assignees had objected to the sale of the estate of Mr. Crammond by the marshal, the sale could not have been made.

Suppose the assignees had sold the land? They had the

power to sell it, and it might have been their duty to sell it.—They might have been compelled to execute their trust; and they had therefore a right to the fund. The execution therefore could only, in that case, have been levied on the land with the assignees' consent.

2. The second proposition is, that notwithstanding the decision of the Court in Thelluson *vs.* Smith, it may be argued, that the provisions of the law, which gives the priority, were not intended to extend the general rights of creditors.

It will scarcely be claimed, that the United States can dislodge all liens. The case of freight—the advances of a factor—insurance brokers' accounts; cannot be supposed to be affected by the law.

The argument on the other side, is, that the assignees cannot, under the injunctions of the law, pay any debt, until the United States are fully paid. This evidently is, that they are to pay out of the estate, in *their hands*. Now what is the estate of the debtor in the hands of the assignees? Not the land unembarrassed; but the land subject to the liens upon it.

Again: assignees do not pay prior judgments in favour of creditors. The judgment creditor proceeds against the land, not against the assignees; and he obtains payment, not from the assignees, but from the fund raised by a sale of the land, under the execution. How is any other construction of the law practicable? The assignees take the property, subject to the lien. Does it pass free of the lien or not, just as it may appear the United States are or are not creditors? They may not be named in the assignment at all.

Again, if the United States are creditors, does the property pass free of all liens; and after paying the United States, go to the other creditors?

It is true the case of Thelluson *vs.* Smith is sufficient for the defendants. It expressly saves the case of a mortgage.

Do the documents, or either of them, exhibited by the defendants, vest any interest in the outward cargoes of the vessels named in them, in the defendants? It is contended that they vest a clear legal interest in the outward cargo, mentioned in the bill of lading. It should not be called the creation of a lien, but the transfer of a legal interest in the cargo.

The bond creates no *lien*, it contains no words of positive conveyance. The assignment does; and by it the owner transfers the property. This might have been done by other writings. Property at sea may be legally sold, without endorsement of the bill of lading. Strictly speaking, the evidence in this case does not show an assignment of a bill of lading, such an assignment being properly by the consignee; but it shows a transfer of the goods, *written on the bill of lading by the shipper*,

and the admitted owner. It passes the property; nor could the consignee, by an assignment of the bill of lading, give the property to any other, *because the bill carries notice of another ownership.* Barrow *vs.* Coles, 3 *Camp.* 92.

A bill of lading is no more effectual to pass property than any other instrument, except that it is negotiable. A buyer under it, for value, without notice, may hold against all other or intermediate rights. 2 *Holt*, 72.

Property in goods, shipped under a bill of lading, may be transferred by delivery, to a third person, without endorsement of the bill of lading; and such transfer will be good, against all the world, except the endorser of a bill of lading, for a valuable consideration. 5 *Taunton*, 558. *Ibid.* 79. 759. 1 *Mar.* 233. 4 *East*, 211.

And the property in goods, shipped under a bill of lading, may be vested in another without either delivery or endorsement of the bill of lading; as, by an agreement between the owners of the goods, and third persons, either in the character of creditors, or purchasers, accompanied by acts, vesting the property in the goods in such persons. 3 *East*, 585. 4 *Campbell*, 31. 4 *East*, 211. 3 *Chitty*, 404. *Ibid.* 350, 351.

This last case is thus: "Vendor did not send bill of sale—but *agreed* to deliver goods, vendee accepted bills for the *purchase*, and before the arrival, sold the goods—*and became bankrupt.* Held, that the purchaser could hold against the vendee.

Here then was a transfer of the interest of Thomson in the specie, and strictly speaking, it was not a qualified, but a positive, direct, and absolute transfer, as is shown by the words employed for the purpose. Its only limitation was the specification of the object, for which it was made. It is a collateral security, and is just what it should be; for if it had appeared to be an absolute sale, when only security was intended, it would have worn a badge of fraud. The conveyance is made to carry a lawful agreement into effect, and the words of the assignment are full and clear, and are restrained only by the designation of the purpose.

It is hinted, that it is not to be taken as conceded, that a mortgage of personal chattels can stand against the United States' priority.

The general principle is, that a mortgage of goods is like a mortgage of lands. Where there is good faith, and the thing is actually delivered, this position cannot be questioned. The 13th *Eliz.* ch. 5, applies both to goods and lands, and saves both, if "made upon good consideration, and *bona fide.*" It may obstruct creditors, or delay them, and yet be good. Meux *vs.* Howell, 4 *East*, 1. 5 *John.* 258.

It is a strong proposition, that the priority of the United States is to override mortgages of personal chattels. It may be

said to be an *ultra principle*. Goods are mortgaged, and ships are mortgaged, every day. The rule, if it exist at all, must be made general. It cannot apply only to those mortgages where possession follows, for some mortgages do not allow possession, and are good without it. Such a doctrine is alarming.

Was there a good consideration for the assignment of the specie made by Thomson to the defendants?

Thomson was a borrower of the defendants' money. He had given a bond for it. Events might discharge him, but until they did, he was their debtor, and at the proper time, he must pay. This was sufficient. United States *vs.* Hooe. 3 *Wheat.* A similar transfer of any other goods would have been equally available to secure the bond.

There being a legal conveyance by the owners of the property to the defendants, it must be assailable on other grounds.

The first objection is, that the instrument was not a *respondentia* bond, because the goods were already on board, and the ship had sailed two months before the loan.

1. To this it is answered, that there is no law requiring the very goods and money to be put on board. The mode of transacting business of this kind has changed; and when the money or goods may be on board, is now of no consequence. In the very form of a *respondentia* bond, (2 *Holt*, 433,) the consideration is the acceptance of a bill of exchange at four months.

2. No matter whether this is a *respondentia* bond, or not. There was a transfer of all the goods for a sufficient consideration.

Third. The contract it is said, was illegal, and, therefore, every thing done to carry it into effect was void. It was illegal, because it was usurious, and usurious, because the vessel had sailed before the loan, and part of the risk and time was therefore gone.

The vessel, it is true, had sailed, but no information had been received from her since her sailing; and the defendants therefore bore all the risk from the wharf. There is no limit, by law, to marine interest. If this was intended to be a *bona fide* marine risk, it is not usurious, whether the premium be high or low.

The next objection is, that the possession and appearance of property remained in Thomson.

The answer to this is, that the possession of the property was in the master of the vessel. Property in the defendants was shown by the papers. But, if this had not been the fact, the consequences claimed by the United States would not follow. As between the defendants and Thomson, the property had passed to the defendants, and no change was made by the re-shipment; John R. Thomson at Canton being only an agent; the rights of the defendant could not be divested by any

act of the consignees, as he received the property for the use of the assignees of Edward Thomson; and when the shipment was made in Canton, by the agent, the rights of the defendants were perfect against Thomson, against creditors, and all others, but a *bona fide* purchaser. The result of this reasoning is: The transfer and assignment of goods at sea, by a proper written instrument, for an adequate consideration, and in execution of a valid contract, gave the defendants a legal interest in the goods; and as this transfer was on the bill of lading, so that no title by endorsement of the bill could be attained against the defendants, their title was indefeisible.

The title of the defendants was a legal title, the equitable interest remaining in Thomson. He was entitled to a proper application of the proceeds, to an account, and to profits, because the shipment was for his account and risk.

When the vessel returned to the United States the legal title was in the defendants, before as well as after the delivery of the bills of lading. Their title was not derived from the bills of lading but from an earlier source, and the delivery of the bill of lading had no other effect but to identify the property, and to prevent any other title being acquired by purchase, under those bills.

No one claims the property under the bill of lading as purchaser. On the 19th of November the bill of lading had not changed the property, and it still was in the defendants. It had not, and could not have got back to Thomson, and therefore could not pass to his assignees.

The defendants had a right to claim this property against the assignees. The United States could not, as has been shown, levy upon it; and if the United States could, for their priority disregard the assignment, they are only prior creditors, and as such had no right to the property. As if there had not been a general assignment, the general creditors could not levy upon this property; so disregarding the assignment, if the United States claim so to do, they as creditors could not levy on it. It is contended that goods may be mortgaged, and if the transaction is *bona fide*, possession need not follow, if the bargain be otherwise. *Cook*, 264, *4th class of his cases*. *Prec. in Chancery*, 285. 1 *Pick. Rep.* 389. 2 *Ibid.* 607. 5 *John.* 258. 3 *Caines*, 166. 2 *Term Rep.* 389. 10 *Vez.* 139. 4 *Bin.* 258. Barrow *vs.* Paxon, 5 *John.* 258. 8 *Ibid.* 446. Craig *vs.* Ward, 9 *Ibid.* 197. 15 *Mass.* 244.

Mr. Wirt for the plaintiff, in conclusion.

On the 19th November 1825, Edward Thomson made a general assignment of all his property for the benefit of his creditors. It is, therefore, one of the cases of established insolvency on which the priority of the United States arises.

The debt to the United States was due for duties on foreign goods imported.

The case then depends on the operation of the Act of 2d March 1799, 3 *L. U. S.* 197. 565. Which provides, that in all cases of such an insolvency the debt due to the United States shall be *first* paid *before any other debt.*

Was there a debt due on that day to the Atlantic Insurance Company? Is it of this debt they claim satisfaction? The statute answers that the debt of the United States is first to be paid. By this statute, it is manifest that the United States are preferred to all other creditors. Was the Atlantic Insurance Company creditors? If so, they are postponed to the United States.

Is a creditor by mortgage, a postponed creditor within this statute? This question has never been solemnly decided by this Court—either as to a real or personal mortgage.

In Fisher *vs.* Blight, 2 *Cranch*, 358, the question did not arise. The question there was whether the preference given to the United States extended to all persons, or was confined to a particular class of debtors, public officers, and agents of the United States.

In the United States *vs.* Hooe and others, 3 *Cranch*, 73, the question did not arise—the only point, then decided, being that a mortgage of *part* of a man's effects, did not establish an insolvency within the statutes, on which the preference of the United States arose.

In Harrison *vs.* Sterry, 5 *Cranch*, 289, the case went off on the ground that the prior assignment was a fraud upon the bankrupt laws, and did not affect the priority of the United States.

In Thelluson *vs.* Smith, 2 *Wheat.* 396, the question of a *prior lien by mortgage* did not arise.

But the question of a *prior lien by judgment* did arise, and then the Court after quoting the words of the Act of Congress say—"these expressions are as general as any that could be used, and exclude *all debts due to individuals whatever may be their dignity.* The assignees are made personally responsible to the United States, if, in case of insolvency, they pay *any* debt previous to those due to the United States. *The law makes no exception in favour of prior judgment creditors;* and no lien has been, or, we think can be shown to warrant this Court in making one."

The United States *vs.* Howland & Allen, 4 *Wheat.* 108, only re-asserts the principles of former cases—and this is the last case upon the subject of these statutes.

It is true, that in the argument of the former cases, it has been occasionally said at the bar, *arguendo*, that a mortgage

would defeat the priority of the United States. And in some of the cases the Court, *arguendo*, has *incidentally* admitted the position. These were but *dicta*. But it has never been solemnly decided by this Court; and they have never been required to look solemnly at the question, with a view to its decision—by hearing an adverse argument against the proposition. They *have* said that this priority is not in the nature of a *lien;* so as to avoid prior *alienations of property* by the debtor. And this admitted, *he may sell it, he may part with his title to the property*—and the alienation will be good.

But this is not the question.

The question is whether the *creation of a lien* in favour of a *creditor*, does not leave that creditor still a *creditor*—the debt, still a *debt*. And whether if he retains this character of a creditor down to the time of the insolvency, differing from other creditors in no other way than by having a *lien* for his debt; that *creditor* with his lien and that *debt*, be not postponed to the United States, by force of the Act of 1799.

It is not meant to admit, that the case before the Court is the case of a mortgage. But taking it in the first instance in this the strongest attitude which it is capable of assuming; the Court is asked, whether under this statute, a mortgage creditor finds any protection in its terms or meaning against the priority given to the United States?

In Thelluson *vs.* Smith this Court said,—"the law makes no exception in favour of prior judgment creditors." Does the law make any exception in favour of prior mortgage creditors? The answer must be the same in both cases. It makes *no exception* in favour of *any creditors*. Whoever therefore stands in relation of a *creditor* to the insolvent, whoever is claiming a *debt* against him, is expressly postponed to the United States. The existence of a *prior lien* in his favour, will not protect him from this consequence. There was a *prior lien* in Thelluson *vs.* Smith—the Court decided the case upon the concession, that the judgment was a *lien upon all the lands of the defendant*. And when a *lien* is all that the creditor claims, it cannot vary the determination, that the *lien* is on a *part* of the estate instead of being on the *whole*.

A *lien* upon the whole, *considered merely as a lien*, is precisely of the *same nature* with a *lien* upon a part. The terms *general and specific lien*, cheat the mind with an imaginary distinction, which has no real existence either in law or reason. For considered in the light of a *lien, merely*, the one means nothing more than a lien upon the whole—the other a lien upon a part. And it is not conceivable that a lien upon part, can strengthen a lien upon the whole.

Now what is a mortgage, but a *lien* on an estate for the *secu-*

rity of a debt? In a Court of law it is, from its form, considered as an absolute conveyance of the estate; and the mortgagee can recover it in ejectment. But in equity, even after the day of payment has past, it is still considered as a *mere security for a debt.* And the Act of 1799 looks through the form to the substance of the thing. Is the mortgagee still a creditor? The terms of the Act postpone him to the United States. Is the *debt* for which the mortgage is given still a *debt?* It is postponed to the debts of the United States. Is the mortgage, in its *essence*, and *object*, any thing more than a *security* for a debt? Is it any thing more than a *lien* on a particular subject for a *debt?*

It is objected, that the priority given to the Act of 1799, is only a priority to be paid out of the *estate of the debtor:* and the subject having been previously mortgaged, constitutes no part of *his* estate; but has become a part of the estate of the mortgagee. The answer to this is—that this is the very question in controversy.

Lord Hardwicke says expressly—"the person entitled to the equity of redemption is considered as the *owner of the land*, and a mortgage in fee is considered as personal assets." And again—"by a decree of all lands, tenements, or hereditaments, a mortgage in fee shall not pass, unless the equity of redemption be foreclosed;" and again—"the *interest* of the land must be somewhere, and cannot be in abeyance; *but it is not in the mortgagee, and, therefore, must remain in the mortgagor.*" 1 *Atk.* 605–6, Carbone *vs.* Scarfe.

Is it not perfectly familiar to us all, that in a case of equity, a mortgage is considered as a mere security for a debt? Blackstone puts it, in this view of the case, on the same footing with a bond—a mortgage says he "is also landed security, as a bond is a personal security, for the money lent." 3 *B. C.* 435.

Now suppose a question between the United States and a prior mortgage, to arise before a Court of Equity of the United States. The United States claim priority of payment out of the estate of the insolvent mortgagor, insisting that the mortgaged subject is a part of his estate. The mortgagee on the other hand alleges that the estate is not in the mortgagor but in *him.* That the mortgagee is *the owner of the property.* Would not the Court answer him in the language of Lord Hardwicke "*you are not the owner—the mortgagor is the owner—the interest is in him;* and the instrument you hold is not a *conveyance of the estate* but a *mere security upon it.* It is a *lien* in your favour—but it leaves the *ownership in the mortgagor*—it leaves you still a *mere creditor for a debt*—holding, *indeed*, a *lien* on the estate—*a lien* intended to give you a preference—but that intention is defeated by a statute, which creates a preference in favour of the

United States which rides over all other liens—and considering you merely in the light of *a creditor claiming a debt*, must be postponed to the United States."

If this would be the language of a Court of Equity, in such a case, in expounding and applying the statute, will the question be varied, because the construction of that statute arises before a Court of Law? Will the statute have a different application in one Court from that which it would have in the other? In a question arising on the same statute, would a creditor be postponed in a Court of Equity, who would be preferred in a Court of Law? Would it be of any substantial use to the mortgage creditor, to prefer him in a Court of Law, if he must be postponed when carried before a Court of Equity?

The United States being remediless before a Court of Law, could they then, *on that ground*, go into a Court of Equity, and there strip the mortgagee of the momentary advantage which he had gained in the Court of Law? It is most manifest, that if the protection claimed for the mortgagee against the priority of the United States, proceeds only on the postulate that he is the *owner* of the mortgage subject, that postulate could not avail him before a Court of Equity; where it is expressly held that he is not the *owner*, but that the *mortgagor is the owner;* the mortgagee being still a mere creditor, holding nothing more than a security on the subject for the debt; and if he be a creditor, holding merely a security, and not the owner of the property, it has never been disputed that the United States are to be preferred.

There is no hardship in the case, which does not apply with equal force to any other private creditor. Every man like the mortgagee trusts another on the credit of his property, and means and consequent ability, to meet his engagements. It is hard upon them all to be postponed to the government;—and as hard upon the vigilant judgment creditor as upon the mortgagee. Nor is it perceived how postponing the mortgage creditor, would tend any more to shake the confidence of man in man, and to embarrass the commercial operations of the country, than the postponement of all the other creditors. All men deal now upon an understanding that the payment of the debts depends on the solvency of the debtor; and, that in a case of established insolvency, the government has the preference. Mortgages and all other liens and preferences, would still hold between private creditors. It is only to the government, that these and all other creditors would give way.

It is submitted, therefore, to the Court, that if this were the case of a mortgage, the mortgagee would still be a *creditor* merely, and as such expressly postponed by the statute. We are dealing here with an equitable title—so the charge considers

it, and we are construing the statute with reference to such a title.

But, if before a Court of Law, a mortgage, from its peculiar form and structure, would be considered as conveying the amount of the property, because such a Court could not look from the terms of the conveyance to the private understanding of the parties, and that it should be a mere security for a debt, the difficulty does not exist here.—Because here, upon the face of the agreement, and in its express terms, the Court see that nothing more was in the contemplation of the parties, than to create a security for a debt. At every step it is proclaimed, that the intention of the parties looked no farther than to the mere creation of a security—"a collateral security for the *loan*—a continuation of the collateral security for such loan." This is the express language, both of the memoranda on the bond, and the assignment of the bill of lading. It is not, as in the case of a mortgage, *a consideration paid in purchase of the goods;* but a sum *loaned* and *security taken for the repayment of the loan.*

With this avowed, clear, continued, uniform declaration of the *intention* of both parties, can the Court impute to them a different intention? And if their intention went no farther than to create a security for a debt, does not the creation of the security, leave the owner of that debt still a mere creditor? Would not the repayment of the loan, either by Thomson or his assignee, be the mere payment of a debt to a private creditor? And is not the payment of *any private debt* forbidden by the statute, until the debts due to the United States shall first be satisfied?

But it is argued, that although the object is admitted to be to create a security for a debt, that security was intended to be created, and was created, by conveying to the creditor the title to the property, who thereby became the owner of it. The answer is, he is a creditor then upon the security of a fund of which he is the owner.—Is not this a legal solecism? If the fund be his, he is no longer a creditor with regard to that fund; unless a man can be a creditor to himself.

It is also asked, is not this the case with a mortgage? No—the moment that the mortgage is viewed in the light of a security, the ownership is at an end. In a Court of Equity, where it is considered in this light, we have seen that the ownership of the mortgagee is denied. In a Court of Law the mortgage after the day of payment is passed, is not considered as a security but as a conveyance of the title, and then the mortgagee is held to be the owner—but not a creditor on the security of the fund.

But we are yet to see a case, where before the same tribunal a party has been considered as being at once a creditor upon the security of a fund, and the owner of that fund. He may have a

special or qualified property, as that of a bailee, which will enable him to maintain trover against him, but still he is not the owner of the fund, as against the bailor. He may have a lien accompanied with possession, which will authorize him to hold the possession even against the owner—but still it is a *lien* which he has, and nothing more—and a lien will not prevail against the United States. So with regard to a pawn or pledge—it is in a Court of Law on the same footing with a mortgage in that Court. Before the day of payment has past, the lender on a pawn, though he has the possession, is considered *as a creditor on the security of the subject pledged.* When the day of payment is past, he ceases to be a creditor, and becomes the owner.

The notion then of a lien on a fund, which belongs to the holder of the lien, is a legal solecism. They cannot co-exist—the character of a creditor with his lien, ceases, at the same moment when his ownership begins.

It has been already admitted on the authority of decided cases, that the priority of the United States constitutes no lien—but leaves the power of alienation free. Is the creation of a lien an alienation either total or partial? If a lien be an alienation to the amount of the debt, then to the amount of that lien, the priority of the United States cannot attach. But, if such be the effect of *a lien*, the same effect must be produced, whether that lien be created by the act of the party, or the act of law. Being in both cases *a lien*, the legal effect must be the same. But in the case of Thelluson *vs.* Smith it was conceded by this Court, that the judgment was *a lien* on all the defendant's lands.

If, therefore, the effect of a lien be to divest the estate of the debtor to the amount of that lien—to alienate that estate, and make it *pro tanto* the estate of the creditor, that effect was produced here, and the priority of the United States so far defeated. Yet it was not produced here, nor was the priority of the United States defeated, or in the slightest degree affected by that conceded lien. Why? Because the Act of Congress had made no exception in favour of creditors, holding a lien, or of *judgment creditors*, who were conceded to be creditors holding a lien.

But if a difference should be supposed to exist between a lien created by the act of the law, and a lien created by the act of the party, and that the latter necessarily alienates the property *pro tanto*, we have a decision of this Court to the contrary—a decision which marks the distinction between the creation of a lien, and the alienation of the title by the act of the party. A bottomry bond is a contract, *in the nature of a mortgage*, when money is raised for the repairs of a ship, and the master or owner *pledges* the keel or bottom of the ship, to secure the re-

payment of the money. Here all the books concede, that there is *a clear lien* created by the act of the party—but does that *lien* produce an alienation of the property? Blaine *vs.* The Ship Charles Carter, 4 *Cranch*, 332, proves the reverse. It does not pass the title, and therefore the holder of the lien in that case, lost it by laches. It is merely a lien to be enforced in a Court of Admiralty.

The question then returns.—

What was the condition of the Atlantic Insurance Company with regard to the property, on the 19th November 1825, when the insolvency occurred—and the priority of the United States arose—were they the owners of this property in part or in whole, or were they merely creditors holding *a security* on this property, for the satisfaction of the debts—and this merely on a *par* with the holder of *a lien* by bottomry? This depends on the construction of the documents.

1. The first document on which they rest their claim, is the *respondentia* bond. The loan on which this *respondentia* bond was given, was confessedly made two months after the vessel and cargo had sailed for China. The interest charged is marine interest, at 10¼ per cent. per annum. Was the contract valid, upon the law which governs that peculiar contract?

It is needless to carry the investigation to the law of Rome, and of France, with which it is agreed we have nothing to do. It may be remarked however, in passing, that under these laws, it was never pretended that this species of loan divested the borrower of his title to the property. Nothing more was ever thought of, than that he stood upon the footing of a *privileged creditor*—and the question was always one of mere *precedence* in the order of payment—which however material, among private creditors, could have been no question of lien, where the precedence of the government takes place over all others.

Passing from the law of Rome and France, to our own law, none is known which we have upon this subject, except the law of England—and with regard to that law, while the elementary writers by their definitions and their commentaries, treat it as essential that the loan should precede the departure of the vessel, or at least have been applied to the voyage;—there is not a single adjudged case, which recognises a loan on such mode, for any other purpose than the purpose of the voyage.

The question is not whether marine interest is against the statute of usury, when the principal as well as the interest is put at risk. It is conceded that it is not—i. e. that such interest would not be a violation of *the statute of usury*.

The single question on this point, made in the Circuit Court, was whether according to the law of this peculiar contract, it was not essential that the money should have been lent for the purposes of the voyage, and under circumstances in which it

might have been applied to those purposes. Not that the lender was bound to see to the application; but that he was bound to look to the case, so far as to ascertain that the loan was made under circumstances in which it might have been so applied.

The only difference between bottomry and *respondentia* is, that the first gives a lien on the ship—the last gives a lien on the goods. In all other respects, bottomry and *respondentia* are declared to be identical, so that a definition of the one is a definition of the other. *Park*, 410—*Eng. ed.*

Now what is the definition of bottomry?—

1. 2 *Black. Co.* 457-8.—"Bottomry (which originally arose from permitting the master of a ship in a foreign country to hypothecate the ship, *in order to raise money to refit)* is in the nature of a mortgage of a ship, *where the owner takes up money* to enable him to carry on his voyage, and pledges the keel or bottom of the ship, part for the whole, as a security for the repayment."

Park, 410.—"The contract of bottomry is in the nature of a mortgage, in which the owner borrows money *to enable him to fit out the ship, or to purchase a cargo for a voyage proposed.*"

2 *Marsh.* 733.—"Bottomry is a contract in nature of a mortgage of a ship, in which the owner borrows money to enable him to fit out the ship, or to purchase a cargo for a voyage proposed."

Again. *Marshall* 2, 736, says—"If the money was spent in the place where it was lent, it was not *pecunia trajectitia*, &c." so that, with the Romans, *as with the moderns*, it was *of the essence* of this contract, that the loan should *be exposed to the perils of the sea, at the risk of the lender.*"

In the next page (737) he says—"in bottomry, the lender furnishes the borrower with money to *purchase the goods which are put in risk.* And Park says, 413. 415, 4th edition, "the lender supplies the borrower with money, *to purchase those effects upon which he is to run the risk.*"

Now if the Court say, that a man who borrows money to pay for his common purposes, and for other objects and concerns, is a borrower at *respondentia* on a bottomry, because he puts the payment on the return of a ship from sea, with which the loan has no connexion, there is an end of the objection. But there is certainly nothing in the English law, which countenances such a position.

With regard to the presumption that the money was so applied—the United States offered to repel it by showing that it never was so applied—but the inquiry was stopped in the case of Arny—the Court seeming to entertain the opinion, that the inquiry was immaterial. There is no English case which gives a different view of the law of *respondentia* and bottomry, from those extracted from Blackstone, Park and Marshall. The cases cited from the old English Reporters, apply only to the

question of usury under the statute, when the principal is put at risk. The form of the bonds, as referred to by Mr. Ingersoll, are in conformity with the law as laid down. But suppose the Court to be of opinion, that the bond is free from objection on this ground, the question still is, whether this bond in coming in with the other documents, passed the ownership of the property to the Insurance Company? The *respondentia* bond did not even create a lien, *Park*, 410. A bottomry bond creates a lien, but does not pass the title, Blaine *vs.* Ship Charles Carter, 4 *Cra.* 332.

Does the memorandum on the bond stipulate for a transfer of the title? It stipulates for all that was afterwards done, but expressly for the purpose of *creating a collateral security*—not for that of passing the title.

Did the assignment of the outward bill of lading pass the title? That again expressly declares that the whole object was to create a security, and to continue that security. Did the legal effect of the Act reach beyond the intention of the parties? Such a construction could not be attached—the intention clearly expressed always governs the construction of the contract.

What are the authorities on this subject? Do they say that the assignment of a bill of lading, always produces the effect of passing the property? The assignment of a bill of lading does not always produce the same effect. It always depends on the relation of the parties, and *the intent with which the act is done.* It depends says Holt "on the mutual understanding" of the parties, 2 *Holt*, 72. Here the understanding is clear—it is to be done merely to create a collateral security. The modern cases in England, that have been cited as to the effect of the assignment of a bill of lading, are generally cases between the assignee of the bill and the assignees of the bankrupt; and not on the general provisions of the Bankrupt Law of England.

The Bankrupt Law of England, 5 Geo. II. c. 30. § 28, places the assignees of the bankrupt precisely on the same footing in which the bankrupt himself stood, at the moment of his bankruptcy. In cases of *mutual credit*, they are subject to all the set-offs to which he was subject—and to all the liens which he had created. The others represent only the private creditors, and when offered to another creditor, they are all of equal dignity—all liens therefore stand according to their priority.

Hence, a mere agreement to assign a bill of lading, between such parties has been held equivalent to an assignment, for the purpose of creating a preference among these equal creditors. Such was the case of Lempriere *vs.* Paisley—the Court of King's Bench held that such an agreement created a *lien;* and that the assignees of the bankrupt could not take

the property, without discharging the *lien*. 2 *T. R.* 455. *Pigott's Arg.* 489. *Ashhurst*, 490—argument of Lord Kenyon as cited by him, p. 493. Ashhurst calls it an equitable lien—not an *equitable title*; and he says as "between the person who holds the *equitable lien*, and the assignees, if the lien subsists before the bankruptcy, they shall never recover or retain the thing without discharging the money due;" why?—he gives the reason. "The party who has the *equitable lien*, ought not to have footing *with the rest of the creditors*, for whom the assignees are the trustees." &c.

There it was a question of preference of payment between creditors of equal dignity.

The case of Atty et al. Assignees of Jamieson, bankrupt, *vs.* Hatson, 4 *Campb.* 325, is another case of preference of payment among creditors of equal degree, by force of such a lien. The case of Olive *vs.* Smith, 5 *Taunt.* 56, is another, where the whole bearing of the bankrupt law is decided upon, and all these cases are found to turn on it. Haille *vs.* Smith, 1 *Bos. & Pull.* 563, is another case under the bankrupt law; and there the effect of the bill of lading was expressed, and by the *prior intention of the parties*, it was held to transfer the property, because such was the prior intention, and that transfer was absolute.

On these bankrupt cases in England, it is proper to remark, that they are no guides for a decision under the statute of the United States. They were questions of preference between creditors of equal degree, and the question then always was, whether such a preference had been created by the bankrupt, before his bankruptcy, as gave him a preference to the other creditors. But here, under our statute, there is a creditor of the highest degree, who settles all questions of preference as soon as he appears, by taking it himself, under the authority of the public law. These cases, therefore, are inapposite to the question before the Court.

It has been already said, that in England the effect of the assignment of a bill of lading is not absolute, but depends on the intention of the parties. It may now be added, that there is no case in England, where the assignment of a bill of lading, or the consignment of a cargo, has been held to pass the property, but where there is a present debt, and where such consignment or assignment is made and received, *as a payment pro tanto*. Such was the case of Hibbert *vs.* Carter, which was at first decided on that position.

But afterwards, on proof that it was *not the intention* to pass the *whole* property, that decision was changed, and the ultimate recovery was on that intention against the indication afforded by the bill of lading, 1 *T. R.* 745. Lickbarrow and Mason, 2 *T.*

R. 63, is not a question between the original parties—as to whom, it is there said, that *their intention may be inquired into*—but it was the case of a purchaser, who had purchased and paid for the cargo, and took an assignment of the bill of lading to herself. The result of all the cases is, that such an assignment, as between the original parties, passes the property or not, according to the intention. And this conforms to the case in *Precedents in Chancery* 289—Bucknell & Co. *vs.* Hoylston. This case was the case of a *bill of sale*, which in Hartle and Smith, is said to be a different thing from an agreement with regard to a bill of lading. This bill of sale was held, *upon the intention of the parties*, to amount to *an equitable security*—sufficient to prevail against a general creditor—or the general creditors of the deceased, as giving a lien with regard to the specific subject, against other creditors of equal degree. Now, that the intention of the parties in this case looked no farther than to the creation of a security, is averred by the holder.

And when we come to look at the situation of the parties, we will find that the creation of a security by way of lien, was all that was proposed.

There was no debt due—it depended on a contingency whether there ever would be a debt. At the time of the insolvency there was no debt. The holder of a *respondentia* bond is not considered as a creditor at all. Hence in England, he could not prove his debt under a commission of bankruptcy—until a special statute was there made for his case, 1 *Holt*, 424.

It is not contended that a contingent debt cannot be *secured*—there is no doubt that it may. But the absolute *transfer of property*, so as to throw the ownership on a merely contingent creditor, is contrary to the nature of the case. The creation of a lien to meet the contingency, is natural and proper, and this is all that the parties proposed.

With regard to the return cargo, which was the property in question, there is strong grounds for saying that there was a marked intention to keep the property out of the lender, till the return of the vessel, and the delivery of the bill of lading.

For what he does stipulate from it, is not for a bill of lading consigning the goods to him; but to order.—Now, in whom does the property under such a title abide? Clearly in the shipper—*until the title is actually delivered to order.* The later effect is a transfer only for that time, and here, not delivered till the priority of the United States had attached—say then that the assignment of the outward bill, if standing alone, would have passed not only the outward cargo of specie, but the proceeds in the return cargo; yet that very assignment stipulated for an inward bill to order, which threw the property upon the shipper in Canton, who was the representative of Edward Thomson;

and if the priority of the United States, could not attach before, because the property was in the Company, it attached the very moment the property fell back on Thomson—with the consent of the Company; while the return cargo then was crossing the ocean with a bill of lading to order, in whom was the property of that cargo? Clearly in the shipper—charged, if you please, with an equitable lien in behalf of the Company.

A *lien*, which they could have enforced only in a Court of Equity, if the bill had not been delivered to their order. Because, at law, the title was manifestly in the shipper by virtue of the bill to order, for which they had stipulated.

It is not disputed, that under the authority of the decree in *Precedents in Chancery*, 289, they could have successfully enforced that lien against the other general creditors, and claimed a *preference of them*, by virtue of that prior lien.

But could they have asserted that preference, against the United States?

Now this case is to be considered as it stood prior to the delivery of the bill to order; because the priority of the United States arose prior to that time, and ranged through the whole period, during which the ship was crossing the ocean. If it attached at any time during that period, it could not be dislodged by any thing subsequently done, because it is to be tested only by the state of things which existed, when it arose, and when it was in full force.

The trustees under the general deed of assignment, had no power to alter the condition in which they found the property, so as to affect the priority of the United States.

If they had acted ever so fairly, nothing done by them could have changed the condition of things to the prejudice of the rights of the United States. Clear of their priority by law, the United States are the first object of that trust itself—could the trustees by any *fraudulent* act on their part, create a legal preference among those creditors? Whether the parties to be benefited by it were connusant of that fraud or not, it is apprehended they could take no benefit by a fraud of the trustee. Hence the impropriety of arresting the evidence on this subject.

The positions are again asserted, that with regard to the return cargo, the sole subject of controversy, the legal title to that was in the shipper, that is in Edward Thomson, by virtue of the bill to order not yet delivered.

That this being the very bill stipulated for in the assignment, the legal title was in Thomson, by the consent of the plaintiffs below—charged, at the best, with an equitable lien in their behalf.

That in this condition of things, the priority of the United States fell upon the subject.

(Conard *vs.* The Atlantic Insurance Company.)

That although the equitable lien of the plaintiffs below, would have prevailed against general creditors and given the plaintiffs a preference to payment as against them; yet it is claimed that the preference yielded to the priority of the United States; which having fastened upon the property, in its condition, could not be dislodged, by the subsequent delivery of the bills to order.

Mr. Justice STORY delivered the opinion of the Court.—

This is an action of trespass, *de bonis asportatis*, brought in the Circuit Court, for the district of Pennsylvania, by the Atlantic Insurance Company, to recover against the defendant John Conard, the Marshal of that district, the value of certain teas, shipped on board the ships Addison and Superior, and levied upon by him, upon an execution, in favour of the United States, against one Edward Thomson, as the property of the latter. The real question in the cause is, whether the Insurance Company or the United States, are entitled to the teas or their proceeds.

The material facts, disclosed at the trial in the Circuit Court, were, as follows:—Edward Thomson was a merchant, largely engaged in trade in the city of Philadelphia, in the year 1825; and on the 21st day of June of that year, borrowed, at *respondentia*, of the Insurance Company, the sum of 21,000 dollars, upon goods, &c. on board of the ship Addison, of that port, on a voyage, at and from Philadelphia, to Canton, and at and from thence, back to Philadelphia; beginning the risk, on the 21st of the preceding April; about which time the ship had sailed on the voyage. Edward Thomson had shipped on board of the Addison, for his own account and risk, for the voyage, 21,000 Spanish dollars, consigned to J. R. Thomson, his agent and his assigns, and deliverable to him in Canton; and regular bills of lading were accordingly signed; one of which, was retained by the shipper. At the time of the execution of the *respondentia* bond, a memorandum of agreement was entered into by the parties, and an assignment made on the back of this bill of lading. The form and effect of these instruments, will be matter of more particular comment hereafter; at present it is only necessary to add, that the loan purports, on the face of the bond, to be a loan for the joint account of E. Thomson, E. H. Nicoll, F. H. Nicoll, and F. S. Bailey; but in reality, the transaction was for the use and benefit of E. Thomson, and the goods shipped in the Addison, were on his sole account.

On the 14th July of the same year, a loan was made to Edward Thomson, of 13,960 dollars, on goods on board the ship Superior, which had sailed on a similar voyage, on the 6th of June pre-

ceding. A *respondentia* bond was taken in the same form, from the same parties, on the like voyage, with a similar memorandum of assignment of the bill of lading. The only difference between the transactions was, that this loan was applied in part payment of a former loan, made by the Insurance Company on another ship of E. Thomson's. On the 19th of November E. Thomson, having become insolvent, made a general assignment of all his property to Peter Mackie, and Richard Renshaw; for the use of his creditors. At this time, he was very largely indebted to the United States on duty bonds. The Addison left Canton on her return to Philadelphia, having among her papers a bill of lading of the proceeds of the 21,000 dollars, consigned by the shipper (Mr. Fisher attorney for J. R. Thomson,) to order, in blank, and endorsed, in blank, by the shipper, and marked No. 5. This mark was to identify them as the proceeds of the 21,000 dollars. Mr. Fisher also gave the master a manifest, stating the cargo to be consigned to E. Thomson, and a general bill of lading of the whole cargo, consigning it to E. Thomson. The invoice and bill of lading, were dated 22d November 1825. The general bill of lading was not signed. The Superior left Canton, having among her papers a bill of lading of certain articles, valued in the invoice at 3393 dollars, consigned to Peter Mackie, and also a bill of lading of certain articles, valued at $1139 86, consigned to Barclay Arny, and both dated 2d December 1825. Before the arrival of these ships in America, the United States had obtained judgments against E. Thomson, for large sums of money due upon his bonds at the Custom House. Both ships arrived in Delaware Bay, almost at the same time; and an execution issued on behalf of the United States, on one of the judgments against E. Thomson, on the 13th March 1826, and was levied on the ships and their cargoes, on the 15th of March, while they were yet in the bay. It was under this levy, that the goods in controversy were seized by the marshal.

Two or three days before the ships came up to Philadelphia, Peter Mackie, the assignee of E. Thomson, having received duplicates of the invoice and bills of lading of the cargo of the Addison, delivered them to the agents of the Insurance Company at Philadelphia; and upon the arrival of the ship itself, handed over, to the same agent, the invoices and bills of lading, brought by the master. On the 22d of March 1826, Peter Mackie and Barclay Arny endorsed to the Insurance Company the invoices and bills of lading, which came to their order by the Superior. These papers came under cover to Edward Thomson, several being enclosed in the same envelop; and Mackie allotted them to their respective owners, by means of the numbers endorsed upon them. These numbers were ori-

ginally placed upon the outward and homeward bills of lading, and invoices, for the purpose of designating the proceeds of each particular shipment. It appeared, that part of the 13,960 dollars, borrowed of the Insurance Company on the goods in the Superior, was expended in disbursements in Canton; and the two invoices to Mackie and Arny, were consigned to them contrary to instructions; and they assigned them to the Insurance Company, under the belief that they were the proceeds of the outward shipment pledged for the loan. The reason assigned for there being a manifest and general bill of lading, consigning the cargo to Edward Thomson, was to enable him to enter the cargo in his own name, after he had settled with the Insurance Company, and paid the *respondentia* loans. The several particular invoices and bills of lading, were then to be cancelled, and the master was to sign the general bill of lading, and the cargo was to be entered at the Custom House, in the name of E. Thomson. He was in the habit of taking up other large sums, at *respondentia*, and this was the usual course of his arrangements in business.

Such is the general outline of the case. The loan on the shipment in the Superior, as has been already stated, differs from that on the shipment in the Addison, only in the circumstance that it was applied in discharge of a prior loan. In our judgment, that makes no difference as to the legal rights of the parties. The borrower had a right to apply the loan in any manner he pleased; and the mode of its application, if it be otherwise *bona fide*, and legal, does not change the posture of the rights of the lender. We shall therefore dismiss, at once, all further consideration of this point; and treat both cases, as if they stood on a single shipment.

Several objections have been taken to these *respondentia* bonds, to impeach their original validity. It is said, that they ought to be treated as usurious, or gaming contracts; that they are not to be deemed *bona fide* transactions, upon real risks; but transactions void in point of law, upon their face. So far as the questions of usury, or gaming, or *bona fides*, upon substantial risks, are matters of fact, they were left fully open, and have been passed upon by the jury, who have found a verdict against them; so far as there are matters of law apparent upon the record, proper to avoid the bonds, they are still open for inquiry. Two grounds have been relied on for this purpose; First, that the loans were made after the sailing of the ships on the voyage; and Secondly, that the money loaned was not appropriated to the purchase of the goods put on board, and was not the identical property, on which the risk was run. In our judgment, neither of these objections can be sustained. It is not necessary that

a *respondentia* loan should be made before the departure of the ship, on the voyage, nor that the money loaned should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. It matters not, at what time the loan is made; nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. The lender is not presumed to lend upon the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run upon other goods, and it was not a mere contract of wager and hazard. What could be the effect, if it were a mere wagering contract, it is unnecessary to consider; because there is the clearest proof here, that there was property on board belonging to the borrower, and sailing on the voyage at his risk.

The form of the *respondentia* bond in the present case is, as far as we know, the common and usual form. The only deviation from the actual facts is, that it seems in some of its provisions to contemplate the voyage as not then commenced. This probably arose from using the common printed form, which is adapted to that, as the ordinary case. But it misled no one, and was certainly perfectly understood by the parties. The risk was taken for the whole voyage, precisely as if the ships had been then in port; and, if before the bonds were given, the property had been actually lost, by any of the perils enumerated in it, it is clear that the loss must have been borne by the lenders. They could not have recovered it back, since the event was one within the scope and contemplation of the contract. The safety then of the property, at that particular period, does not vary the rights of the parties; and from the very nature of the transaction, it must have been utterly unknown to both, whether the ship was at the time, in safety or not. They entered into the contract, upon the usual footing of policies of insurance, lost, or not lost. So far as this deviation from the fact bore upon the point of the good faith and reality of the contract, as a genuine maritime loan, it was left to the jury to draw such inferences, as upon the whole circumstances, they were warranted to draw. The charge of the learned Judge, in the Circuit Court, was as favourable to the defence on this point, as it could be upon the principles of law.

The next question is, in whom was the property in the shipment vested, at the time of the levy of the execution of the United States. Was it so vested in the Insurance Company,

either in law or equity, that they are now entitled to maintain the present suit; or in other words, to recover the proceeds in the marshal's hands? This depends upon the view taken of the objects, intentions, and acts of the parties, as disclosed in the bonds, and the accompanying papers. When these are once ascertained and settled, it will not be difficult to arrive at the proper legal conclusion.

It is contended, on behalf of the United States, that no title or interest in the property shipped, passed by the instruments taken collectively, to the Insurance Company; that Edward Thomson remained the sole owner of the goods, and their proceeds, during the whole voyage; that at most, the Insurance Company had but a lien upon them for the security of their debt, which was displaced by the priority of the United States; and, finally, that if the Insurance Company had any title or interest in the property, it was not absolute, but by way of mortgage; and even this, coming in competition with the priority of the United States by operation of law, yields to their superior privilege.

Before proceeding to the discussion of the right of the Insurance Company over the property in question; it may be well to consider, what is the nature and effect of the priority of the United States, under the statute of 1799, ch. 128. Although that subject has been several times before this Court, the observations which have fallen from the bar, show, that the opinions of the Court have, sometimes, not been understood according to their true import. The 65th section of the Act declares, that "in all cases of insolvency, or where any estate in the hands of executors, administrators, and assignees, shall be insufficient to pay all the debts due from the deceased, the debt or debts due to the United States &c. shall be first satisfied; and any executor, administrator, or assignees, or other person, who shall pay any debt due by the person or estate, from whom, or for which they are acting, previous to the debt or debts due to the United States from such person or estate, being first duly satisfied, and paid; shall become answerable in their own person and estate, for the debt, or debts so due to the United States, or so much thereof, as may remain due and unpaid; and actions or suits at law may be commenced against them for the recovery of the said debt or debts, or so much thereof as may remain due and unpaid, in the proper Court having cognizance thereof." A subsequent clause of the same section declares, that, "the cases of insolvency mentioned in this section, shall be deemed to extend, as well to cases, in which a debtor not having sufficient property to pay all his or her debts, shall have made a voluntary assignment thereof for the benefit of his or her creditors, or in which the

estate and effects, of an absconding, concealed, or absent debtor, shall have been attached by process of law; as to cases, in which an act of legal bankruptcy, shall have been committed." It is obvious, that this latter clause is merely an explanation of the term "insolvency," used in the first clause; and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. Insolvency then, in the sense of the statute, relates to such a general divestment of property, as would in fact be equivalent to insolvency in its technical sense. It supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *vs.* Hooe (3 *Cranch*, 73;) and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute. So too, a mere inability of the debtor to pay all his debts, is not an insolvency within the statute; but it must be manifested, in one of the three modes pointed out in the explanatory clause already referred to. That was the point, on which the case of Prince *vs.* Bartlett, (8 *Cranch*, 431,) turned.

What then is the nature of the priority, thus limited and established in favour of the United States? Is it a right, which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent such property from passing by virtue of such assignment to the assignees? Or, is it a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignees? We are of opinion that it clearly falls, within the latter description. The language employed is that which naturally would be employed to express such an intent; and it must be strained from its ordinary import, to speak any other.

Assuming that the words "in all cases of insolvency," indicate an entire class of cases, and that the other member of the sentence "or when any estate," &c., is to be read distributively, as has been contended for, on behalf of the United States; it does not, in the slightest degree, vary the construction of the statute. It will then read, that "in all cases of insolvency, the debt or debts due to the United States, &c., shall be first satisfied."

But how are they to be satisfied? Plainly, as the succeeding clause demonstrates, by the assignees; who are rendered personally liable, if they omit to discharge such debt or debts. To enable the assignees to pay the United States, it is indispensable that the fund should pass to them; and if the mere priority of the United States intercepted it, or gave a right to defeat it, the object of the statute would not be accomplished.

If the legislature had intended to defeat the passing of the property to the assignees, as against debts due to the United States, the natural language in which such an intention would be clothed, would be to declare, that so far, such assignments should be void. Then again, the very enumeration of the cases of insolvency, in all of which the assignment passes, and is to pass the whole of the debtor's property, confirms the interpretation already asserted. They are the very cases, where by law there is no exception as to the extent or operation of the assignment to divest the debtor's estate. One of these is the case of a legal bankruptcy; and in the Act on this subject, passed in the next session of Congress, there is an express provision, in the 62d section, that "nothing contained in this law shall in any manner affect the right or preference to prior satisfaction of debts due to the United States," as secured or provided, by any law heretofore passed. Yet the bankrupt Act contains no exception as to the property to be passed to the assignees, in favour of any person. In the case of the United States *vs.* Fisher et al. 2 *Cranch*, 358, which was decided upon great deliberation; this Court held, in the construction of a similar clause in the Act of 3d March 1797, ch. 74, that "no lien is created by this law; no *bona fide* transfer of property in the ordinary course of business, is overruled. It is only a priority in *payment*, which under different modifications, is a regulation in common use; and this priority is limited to a particular state of things, when the debtor is living, though it takes effect generally, if he be dead." And this doctrine was again recognised in the United States *vs.* Hooe, 3 *Cranch*, 73. 90.

If then the property of the debtor passes to the assignees; if debts due to the United States constitute no lien on such property; if the preference or privilege of the United States be no more than a priority of satisfaction or payment out of a common fund; it would seem to follow, as a necessary consequence, that even if the teas in controversy, were the property of Edward Thomson, they passed by his general assignment, in November 1825, (which is not denied to have been a *bona fide*, and valid transaction,) to his assignees; and become their property for distribution among his creditors; and were not liable to the levy under the execution of the United States.

That, however, would be a question merely between the United States and the assignees, and would in no shape help the Atlantic Insurance Company to maintain their present suit.

Then, again, it is contended on behalf of the United States, that the priority thus created by law, if it be not of itself

a lien, is still superior to any lien, and even to an actual mortgage, on the personal property of the debtor.

It is admitted, that where any absolute conveyance is made, the property passes so as to defeat the priority; but it is said that a lien has been decided to have no such effect; and that in the eye of a Court of Equity a mortgage is but a lien for a debt. Thelluson *vs.* Smith, (2 *Wheat.* 396,) has been mainly relied on, in support of this doctrine. That case has been greatly misunderstood at the bar, and will require a particular explanation. But the language of the learned Judge who delivered the opinion of the Court, in that case, is conclusive on the point of a mortgage. "The United States," said he, "are to be first satisfied; but then it must be *out of the debtor's estate.* If, therefore, before the right of preference has accrued to the United States, the debtor has made a *bona fide* conveyance of his estate, to a third person; *or has mortgaged the same to secure a debt*—or if his property has been seized under a *fieri facias*, the property is divested out of the debtor, and cannot be made liable to the United States." The same doctrine may be deduced from the case of United States *vs.* Fisher, (2 *Cranch*, 358,) where the Court declared, that "no *bona fide* transfer of property in the ordinary course of business, is overreached by the statutes;" and "that a mortgage is a conveyance of property, and passes it conditionally to the mortgagee." If so plain a proposition required any authority to support it, it is clearly maintained in United States *vs.* Hooe, (3 *Cranch*, 73.)

It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien for a debt. And so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law; and it is equally true in equity; for in this respect equity follows the law. It does not consider the estate of the mortgagee as defeated and reduced to a mere lien, but it treats it as a trust estate, and according to the intention of the parties, as a qualified estate, and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense that it is sometimes called a lien, and then only by way of contrast to an estate absolute, and indefeisible. But it has never yet been decided, by this Court, that the priority of the United States will divest a specific lien, attached to a thing, whether it be accompanied by possession, or not. Cases of lien, accompanied by possession, are among others; the lien of a ship's owner to detain goods for freight; the lien of a factor on the goods of his principal for balances due him; the lien of an artisan for work and services upon the specific thing. On the other hand, there are liens

where the right is perfect, independent of possession; as the lien of a seaman for wages, and the lien of a bottomry holder on the ship for the sum loaned. In none of these cases has it ever been decided, that in a conflict of satisfaction out of the thing itself, the priority of the United States cut out the lien of the particular creditor. And before such decision is made, it will deserve very grave deliberation, and a marked attention to what fell from the Court, in Nathan *vs.* Giles, (*5 Taunt.* 558. 574.) At present it is wholly unnecessary to decide it, for reasons which will hereafter appear. The case of Thelluson *vs.* Smith, (2 *Wheat.* 396,) is not understood to justify any such conclusion. That case turned upon its own particular circumstances. A judgment, *nisi*, was obtained against Crammond on the 20th of May 1805, in favour of Thelluson and others. On the 22d of the same month he executed a general assignment of all his estate to trustees for the payment of his debts. At that time he was indebted to the United States, on several duty bonds, which became due at subsequent periods. Suits were instituted on these bonds, as they severally became due, and judgments were obtained and executions issued against Crammond, under which a landed estate called Sedgely, was levied upon and sold by the marshal; and the action was brought by Thelluson and others, against the marshal, to recover the proceeds of this sale in his hands. No execution had ever issued upon the judgment of Thelluson and others against Crammond, and of course there had been no levy under that judgment on the Sedgely estate, before or after the levy in favour of the United States. It was admitted, that in Pennsylvania a judgment constitutes a lien on the real estate of the judgment debtor; and it was assumed by this Court, in the argument of the cause, that the judgment of Thelluson and others, bound the estate from the 20th of May, when it was entered, *nisi*, although in fact it was not finally entered, until nearly a year afterwards. The posture of the case then was, that of a judgment creditor seeking to recover the proceeds of a sale of land sold under an adverse execution, out of the hands of the marshal; upon the ground of his having a mere general lien, by his judgment, on all the lands of his debtor; that judgment never having been consummated, by any levy on the land itself. The Court decided that the action was not maintainable. The reasons for that opinion are not, owing to accidental circumstances, as fully given as they are usually given in this Court. But the arguments of the counsel, point out grounds upon which it may have proceeded, without touching the general question of lien. The plaintiffs were entitled to recover only, upon the ground that they could establish in themselves a rightful title to the proceeds. Whether the land

itself was rightfully sold under the execution of the United States, or any title to it passed by the sale, as against the assignees of Crammond, was not matter of inquiry in that case. However tortious or invalid it might be, still, if the plaintiffs had no title to the proceeds, they must fail in their action. Under the general assignment of the debtor, the priority of the United States attached; and if the assignees were willing to acquiesce in the sale, the right of the United States to hold the proceeds, could not be disturbed by third persons. Now, it is not understood that a general lien by judgment on land, constitutes, *per se*, a property, or right, in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor for this purpose relates back to the time of his judgment, so as to cut out intermediate incumbrances. But, subject to this, the debtor has full power to sell, or otherwise dispose of the land. His title to it is not divested or transferred by the judgment to the judgment creditor. It may be levied upon by any other creditor, who is entitled to hold it against every other person except such judgment creditor: and even against him, unless he consummates his title by a levy on the land, under his judgment. In that event, the prior levy is, as to him, void; and the creditor loses all right under it. The case stands, in this respect, precisely upon the same ground as any other defective levy, or sale. The title to the land does not pass under it. In short a judgment creditor has no *jus in re*, but a mere power to make his general lien effectual, by following up the steps of the law, and consummating his judgment by an execution and levy on the land. If the debtor should sell the estate, he has no right to follow the proceeds of the sale, into the hands of vendor or vendee; or to claim the purchase money in the hands of the latter. It is not like the case where the goods of a person have been tortiously taken and sold, and he can trace the proceeds, and, waiving the tort, chooses to claim the latter. The only remedy of the judgment creditor is against the thing itself, by making that a specific title which was before a general lien. He can only claim the proceeds of the sale of the land, when it has been sold on his own execution, and ought to be applied to its satisfaction. To this state of things, the language of the Court in Thelluson *vs.* Smith is to be applied, when it is said, that if the debtor's property is seized under a *fi. fa.* it is divested out of the debtor, and cannot be liable to the United States. Applying these principles to the facts of that case, it is clear that the Sedgely estate had not been divested out of the debtor by any execution on the judgment of Thelluson and others; that it either remained in

the debtor, and was liable to the execution of any other of his creditors, who choose to levy upon it, subject, of course, to have his title overruled by their subsequent levy, when perfected; or, that, subject in like manner, it passed by the assignment, (if that was *bona fide*,) to the assignees; and in their hands, the United States would have a priority of payment out of it, as general funds, in their hands. The judgment creditors, as such, had no title to any fund in the hands of the assignees, until the priority of the United States was satisfied; for that priority does not yield to any class of creditors, however high might be the dignity of their debts.

The fact, that a judgment creditor has a lien, does not place him in a better situation, as a creditor, over the general funds of the debtor in the hands of the assignees. If he possess such a lien he must enforce it in the manner prescribed by law; and if he does, that may so far affect the interest of the assignees actually subjected to such lien. But it gives him no rights to the fund, until he has perfected his lien according to the course of the law. Until that period, he has merely a power over the property, and not an actual interest in it. This ground is alluded to in that part of the opinion of the Court, where speaking of the priority of the United States, it is said, "the law makes no exception in favour of prior judgment creditors, &c. Exceptions there must necessarily be as to the *funds* out of which the United States are to be satisfied; but there can be none in relation to the debts due from a debtor of the United States to individuals. The United States are to be first satisfied; but then it must be out of the debtor's estate." The real ground of the decision, was, that the judgment creditor had never perfected his title, by any execution and levy on the Sedgely estate; that he had acquired no title to the proceeds as his property, and that if the proceeds were to be deemed general funds of the debtor, the priority of the United States to payment had attached against all other creditors; and that a mere potential lien on land, did not carry a legal title to the proceeds of a sale, made under an adverse execution. This is the manner in which this case has been understood, by the Judges who concurred in the decision; and it is obvious, that it established no such proposition, as that a specific and perfected lien, can be displaced by the mere priority of the United States; since that priority is not of itself equivalent to a lien.

We may then dismiss any farther consideration of this topic, unless it shall appear that the right of the *respondentia* holders in the present case, is reduced to a mere general lien; and as to them, at least, (however it may be as to the assignees,) no legal right exists to maintain an action for the proceeds.

The attention of the Court will then be at once addressed, to the question, what was the nature and extent of the interest of the Insurance Company in the shipments in question. It is unnecessary to discuss what would have been the rights of the parties, if the *respondentia* bonds had stood alone; for that is not the posture of this case. The whole instruments must be taken together, and construed as one entire agreement. We must then examine the memorandum, the outward bill of lading and assignments thereon, in connexion with the bond. The bill of lading purports, on its face, to be a shipment by Edward Thomson, of seven kegs containing 21,000 dollars, for account and risk of the shipper; to be delivered at Canton to John R. Thomson, or his assigns. By the well settled principles of commercial law, the consignee is thus constituted the authorized agent of the owner, whoever he may be, to receive the goods, and by his endorsements of the bill of lading, to a *bona fide* purchaser, for a valuable consideration, without notice of any adverse interests, the latter becomes as against all the world, the owner of the goods. This is the result of the principle, that bills of lading are transferable by endorsement, and thus may pass the property. It matters not whether the consignee, in such case, be the buyer of the goods, or the factor, or agent of the owner. His transfer in such a case is equally capable of divesting the property of the owner, and vesting it in the endorsee of the bill of lading. And, strictly speaking, no person but such consignee can by an endorsement of the bill of lading, pass the legal title to the goods. But if the shipper be the owner, and the shipment be on his own account, and risk, although he may not pass the title by virtue of a mere endorsement of the bill of lading, unless he be the consignee, or what is the same thing, it be deliverable to his order; yet by any assignment, either on the bill of lading, or by a separate instrument, he can pass the legal title to the same; and it will be good against all persons, except such a purchaser for a valuable consideration, by an endorsement of the bill of lading itself. Such an assignment, not only passes the legal title as against his agents and factors, but also against his creditors, in favour of the assignee. It is unnecessary to cite particular authorities on these points: they will be found supported by the authorities cited at the argument, and by the elementary treatises of Mr. Abbott, Mr. Holt, and Mr. Chitty, on this subject; and particularly by Nathan *vs.* Giles, 5 *Taunt.* 558. In the present case Edward Thomson was the owner of the goods, and the consignee was merely his factor. He therefore had full power, notwithstanding the consignment, to pass the title to the property in the bill of lading, by a suitable instrument of assignment and sale against any body, but a purchaser

without notice from his consignee, without any actual delivery of the goods themselves, if they were then at sea, and incapable of manual tradition.

The question then is, whether the endorsement upon this bill of lading, constitutes such an instrument? We are of opinion that it does. It purports to be a transfer in *presenti;* and uses the appropriate phrases of grant. The words are, "for value received, I hereby assign and transfer to the Atlantic Insurance Company of New-York, the within bill of lading, and the specie, goods, &c., to be procured thereon and thereby, and any return cargo, to be obtained &c. by the proceeds thereof; and all the return cargo to be taken on board the within named ship, by or on my account, as collateral security, according to an agreement duly executed, and adjoined to a *respondentia* bond, &c., (referring to the memorandum hereinafter stated.) This is not a mere assignment of the bill of lading itself, operating as an equitable grant of the interest of the owner in that instrument; but it is of the goods contained in it, and the bill of lading is referred to, by way of description of the subject matter of the grant. There was a valuable consideration for it; and as Edward Thomson was the legal owner of the goods, the words "assign and transfer," are sufficient words of grant to pass his legal title to the same; unless the operation of those words is controlled by some of the other parts of the instrument. The argument admits this; but it supposes, that the accompanying memorandum shows, that such was not the intention of the parties; and therefore the words are to be construed according to that intention; which was to create a mere lien or equity on the part of the Insurance Company, on the goods. Let us then examine the nature and scope of that memorandum. It begins by a recital, that it hath been agreed that the bill of lading for the goods &c. mentioned in the *respondentia* bond, shall be endorsed to the Insurance Company, as a collateral security for the loan. This is carried into effect by the assignment above mentioned. It then goes on to recite, that it has been further agreed that the property to be shipped homeward, as aforesaid, being the proceeds of the loan, (thus considering the specie on board, as a substituted loan,) shall be for the account and risk of the borrowers; that the bills of lading, therefore, shall express the same, and shall also express that the said property shall be delivered to the order of the shippers; and that the same shall be endorsed in blank, and shall be placed in the hands of the Insurance Company, either before or on the arrival of the said ship, at Philadelphia, as a continuation of such collateral security.

Now, supposing the transaction *bona fide*, what is there here that controls, even by way of recital, the operation of the words

of transfer. If the case were one of absolute transfer, there might be some room for doubt. But here the transfer was as collateral security. It was therefore a mortgage of the goods, and the returns. The shipment out and home, was, as in each case it must be, at the risk, and for the account of the shipper; subject however to the rights of the mortgagee; and the very provision that the bills of lading should be delivered to the order of the shipper, and endorsed in blank, and placed in the hands of the Insurance Company, establishes the fact, that it was the intention of the parties that the property of the return cargo, should rest by such endorsement in them. The memorandum then proceeds to state, that it is expressly declared that the endorsement or consignment shall not be held to exonerate the persons of the borrowers; nor compel the Insurance Company to accept the goods, &c. which may arrive under such bill of lading and consignment, in discharge of such debt; but that it shall be lawful for the company to receive and hold the goods, &c. for ninety days after their arrival at Philadelphia; and if the debt was not then paid, to sell the same at auction, and charge the borrowers with the balance. The plain effect of this stipulation is to avow an explicit understanding, that the assignment of the goods should not put them at the risk of the company, but that they should be deemed collateral security only, and be sold after the limited time, to discharge the debt, *pro tanto*. So far from the intention being indicated, that no property at all was to pass to the company, the solicitude of the parties seems most carefully employed to repel the notion, that the transfer was absolute and not by way of mortgage, as collateral security. The memorandum, therefore, confirms and does not impugn, in any degree, the natural construction of the language of the assignment endorsed on the bill of lading, as importing a present transfer. Indeed we may go farther and assert, that the obvious intention of the parties was to give a specific interest in the goods shipped, so as to make them secure against the claims of creditors; and, that to construe the instruments to create no more than a lien, liable to be defeated by the acts of either party, or to be overreached by any privileged creditors, would be, not to follow, but to frustrate their intention. Of what use could this great apparatus of instruments, so anxiously prepared by the parties, be, if it conveyed no *jus in re*, and left the title of the Insurance Company to the goods, at the mercy of the creditors of Thomson, to be intercepted at any time before it reached their hands, on its arrival. We are therefore of opinion, that the assignment in this case was sufficient to pass a legal title to the shipment and the proceeds thereof, against Thomson and his assignees and creditors. If, indeed, the assignment had been of the outward shipment of

goods only, it would have carried the return cargo, purchased with the proceeds; because the product or substitute for the original thing by sale, or otherwise, follows the nature of the thing itself, so long as it can be ascertained as such, and becomes the property of him who was the owner, in the same quality as he held the thing. This is the general principle of law, and has been even extended to cases, where there has been a fraudulent or tortious misapplication of property. The case of Taylor *vs.* Plumer, 3 *Maul & Selw.* 562, is directly in point; and contains a large collection of the authorities in the elaborate opinion of the Court, pronounced by Lord Ellenborough. In this view of the matter, the only value of the homeward bill of lading would be as a designation of the proceeds, so as to enable the company to trace and identify them. But the assignment, in terms, transfers the proceeds and returns, and cuts off all possibility of question upon this head. If indeed the title to the proceeds had originally been only an equitable title, and not strictly legal; yet as soon as the company had perfected that equity, by endorsement in blank, and possession of the homeward bills of lading, their right would have been consummated at law, so as to entitle them to maintain a suit therefor. The case of Haille *vs.* Smith, (1 *Bos. & Pull.* 563,) was not so strong as the present; and there the Court held, that the property passed, clothed with a trust for the payment of the debt.

If this, then, be the result of the general principles of law, in cases of this nature, what is there to prevent their application to the present case? First, it is said that this debt upon a *respondentia* bond is of too contingent a nature to uphold a mortgage, as collateral security for the payment of it. We know of no principle or decision, that justifies such a conclusion. Mortgages may as well be given to secure future advances and contingent debts, as those which already exist, and are certain and due. The only question that properly arises in such cases is, the *bona fides* of the transaction. Then, again, it is said that the papers here disclose a transaction fraudulent in its own nature. But we are of opinion that there is no necessary implication of law on the face of these papers, which stamps it fraudulent; for ought that appears, the agreement may have been entered into with the most sincere and scrupulous good faith; and whether fraudulent or not, in fact, was a question for the jury upon the whole evidence, which was properly left to their consideration; and they have by their verdict negatived the fraud.

The circumstance, that the goods were to be at the risk of the shipper and on their account, does not, of itself, affect either the validity or *bona fides* of the transfer. That must ordinarily occur, where the transfer is made as collateral security, and it

was one of the leading facts in Haille *vs.* Smith, already cited. 1 *Bos. & Pull.* 563.

But the main objection relied on, and which indeed constitutes one of the exceptions to the opinion of the Circuit Court, is, that possession of the return shipment was not obtained until after the levy by the United States; and it is contended, that the want of such possession is, *per se*, a badge of fraud. The Circuit Court on this point decided, "that the actual possession of the above return cargoes, by the masters of the Superior and Addison, until levied upon by execution at the suit of the United States against Thomson, is not, *per se*, in law, a badge of fraud, which ought to invalidate or affect the title of the plaintiffs to these cargoes."

It appears to us that this decision is entirely correct in point of law, under the circumstances of the case.

Without undertaking to suggest whether, in any case, the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only, *prima facie*, a presumption of fraud; a question, upon which much diversity of judgment has been expressed; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumptive of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties.

A familiar example of this doctrine is in the case of a sale of a ship, or goods at sea, where possession is dispensed with upon the plain ground of its impossibility; and it is sufficient if the vendee takes possession of the property, within a reasonable time after its return home. But in cases where the sale is not absolute, but conditional, the want of possession, if consistent with the stipulations of the parties, and, *a fortiori*, if flowing directly from them, has never been held, *per se*, a badge of fraud. The books are full of cases on this subject. The case of Bucknal *vs.* Royston, *Prec. in Chan.* 285, runs almost upon all fours with the present. The case of Sturtevent *vs.* Ballard, 9 *John.* 338, and Bissell *vs.* Hopkins, 3 *Cowen*, 166, contains strong illustrations of the principle; and being decisions in the very state, by whose laws the validity of the present agreement is to be tried, are of high authority. They sustain the doctrine asserted by the Circuit Court, in the most ample manner; and there is a learned note by the Reporter to the latter case, which embodies in an exact manner the principal authorities, English as well as American, on this subject. Now, in the case at bar, the goods at the time of the transfer were at sea, on a voyage, in which they were to be sold, or exchanged by the consignee, and the proceeds sent back in the same ships. It was therefore properly in the contemplation of the parties, and indeed a necessary result of their stipulations, that the

goods should not be intercepted, or taken possession of by the company, until the close of the voyage; and that the return shipments should conform to this arrangement.

There is no pretence to say, that the plaintiffs did not seek possession of the goods within a reasonable time after the arrival of the goods home. Their power to accomplish it was dislodged by the execution of the United States, and they obtained, as early as practicable, possession of the bills of lading, and vouchers of their rights. But so far as the want of possession was matter of evidence presumptive of fraud, it was left open to the consideration of the jury; and the grievance now is, not that it was so left, but that the Court ought to have instructed the jury, as matter of law, that the want of possession, under the circumstances of the case, was, *per se*, a badge of fraud.

We have already expressed an opinion, that the Court were right in the instructions actually given.

Upon the whole we are of opinion, that the directions of the Court upon the merits of the cause at the trial, were correct in point of law; and that consequently there is no error in that part of the judgment.

It remains to consider, very briefly, certain exceptions taken to the testimony in the progress of the trial.

The first exception is, that the corporate capacity of the plaintiffs was not regularly proved, before the introduction of the *respondentia* bond. It is to be considered, that this was a trial upon the merits; and by pleading to the merits, the defendants necessarily admitted the capacity of the plaintiffs to sue. If he intended to take the exception, it should have been done by a plea in abatement, and his omission so to do, was a barrier of this objection. But, independently of this special ground, the very agreement in the case upon which the trial was had, as well as the admissions of the bond given to the United States, as security to refund the amount, if judgment should pass against the plaintiffs, was certainly, *prima facie*, evidence of an admission, on the part of the United States, of the corporate capacity of the plaintiffs, and to throw the burthen of proof on the other side.

The second exception was to the question put to Austin L. Sands, whether he was agent of the company.

We see no objection to this question. It was put in a form most unexceptionable; and it was a matter of subsequent inquiry, in what manner his agency was created; and it does not appear, from the nature of the question, whether it might not have been sufficient to establish that he was an agent, *de facto*, to receive the bond. It was indeed but an exception to the order of proofs, where several things are to be established to lead to a result; and in what order the inquiry is to be had, is

matter of discretion in the Court itself, and not of absolute right in the party.

The next exception is to the allowance of the bond to go to the jury, upon proof of its execution, by Thomson only.

It was a joint and several bond, and if executed by Thomson alone, it might be material to the plaintiffs' case. It was not introduced as general evidence, as to all the parties who were named in it; but only as to Thomson, and was connected with the title derived under him. Proof of the signature of Thomson, was, under the circumstances, *prima facie* evidence of his execution of the instrument.

The fourth, fifth, sixth, and seventh exceptions, turned altogether upon the question whether acts and proceedings of third persons, not in privity with the Insurance Company, nor known to them, were evidence against them? Most clearly they were not.

The eighth exception involves the point, whether the plaintiffs were bound to look to the application of the loan made by them. If not, the question asked was properly rejected. And we are of opinion, that the plaintiffs had nothing to do with the application of the money; and that when received by Thomson, he had a right to dispose of it in any manner he pleased.

Upon the whole, the judgment of the Circuit Court is to be affirmed with costs.

Mr. Justice JOHNSON.

I concur in the opinion delivered in this cause, and the rather, because I think it overturns the report of the decision in the case of Thelluson *vs.* Smith. It would be vain, to endeavour to reconcile this decision, with that, which is imputed to the case referred to.

This was nothing in its origin but a mortgage to the Atlantic Insurance Company; and a mortgage of a mere right, a metaphysical, transitory thing, over which the act of the party could not operate more immediately, or more forcibly, than a judgment upon land under the laws of Pennsylvania.

But I avail myself of this occasion, and I have long wished for an opportunity to put on record some remarks upon the report of the case of Thelluson *vs.* Smith. I have never acknowledged its authority in my Circuit, on the point supposed to be decided by it; to wit, *the precedence of the debt of the United States, as to a previous judgment, in the case of a general assignment;* and I propose now to show, what I think any one may see by a close inspection of the facts, even as stated in the report, to wit, that the question there supposed to be decided, really never was raised by the special verdict. It is true, it was argued, and no other question, judging from the report,

was argued. But, when the Court came to inspect the record, it must have seen that the special verdict did not raise the question, as between the parties to that suit. And, moreover, I find that the reporter has omitted one very material fact found in the special verdict; which was, that the United States had no interest in the issue, since their judgment had been voluntarily paid off by the assignees of Crammond the bankrupt. I copy the special verdict entered from the original roll, which I have inspected at the present term.

The jury found, "that on the 22d of May 1805, William Crammond of Philadelphia merchant, stood indebted to the United States in several bonds for duties, as follows:—(describing the bonds all of which were due after the date of the assignment.) On the respective bonds suits were brought, judgments entered, executions issued, and a sale made of a certain real estate called Sedgely, the property of William Crammond, and the proceeds thence arising came to the hands of the defendant John Smith marshal of Pennsylvania district, from whom it is claimed by the plaintiffs (who are) creditors of the said William Crammond on the following grounds:—A suit was instituted by the plaintiffs, in the Circuit Court of the United States for the district of Pennsylvania, against the said William Crammond, as of October Sessions 1802, and a judgment in the said suit, in favour of the plaintiffs, and against the said Crammond, was obtained for 32,253 dollars, on the 20th of May 1805. On the 22d of May 1805, the said William Crammond was insolvent, and had not sufficient property to pay all his debts. But his insolvency was not a matter of general notoriety. On the 22d day of the said month, the said William Crammond executed a general assignment of his estate and effects, bearing date the same day and year, and delivered it to the assignees therein named (*prout* assignment;) being on the said 22d of May, unable to satisfy all his debts. The moneys in the hands of the defendants, are claimed by the assignees under the said assignment, *who have satisfied the United States the amount of the debts due the United States.* If upon the whole matter," &c., in the usual alternative form of a special verdict.

Judgment below was rendered for defendant, and it is impossible it could have been otherwise; but not, as I conceive, upon the ground stated, since it is one which the verdict does not raise. It is true, the question was argued, but adjudications are not to have their effect from the questions argued, and the views taken by counsel in their points or briefs. There is a sensible rule laid down on this subject, in a book of grave authority, and the truth of which this Court has had occasion to verify not unfrequently; the purport of which is, that counsel ought not to "move any thing in arrest of judgment, ex-

cept the roll wherein the judgment is entered, or the *postea*, be in Court, 22 *Cas. B. B.*, and the reason assigned is, that the Court may be satisfied that the matter moved in arrest of judgment is truly recited from the record; for the Court will not rely upon the allegation of counsel at the bar."

It often happens, after the most protracted discussions, that the Court differ from counsel in their views of the questions actually raised on the record, and on grounds which have not been argued.

In the case of Thelluson *vs.* Smith, I hold it to be incontrovertible, that the question of priority could not have been adjudicated upon, on the verdict, as set out in the record.

The special verdict does not give the date of the levy, and sale by the marshal, under the judgment by the United States; but as all Crammond's bonds to the United States fell due after the date of the assignment, it follows that the judgment, and necessarily all proceedings under it, were subsequent to the execution of that deed. The land levied on, therefore, had passed out of Crammond before the judgment of the United States was obtained, and of consequence the levy and sale under their execution, was a mere nullity. Could this furnish the ground of an action for money had and received by the Thellusons, in right of a judgment prior to the consignment, against Smith the marshal? It obviously could not. For as against the Thellusons' rights, whatever they were, nothing had passed. The purchaser of the lands at marshal's sale, who had received nothing for the money, might have brought such an action against the marshal; and the assignees might have sued for and recovered, the land; in which case it would have been held by them, as before, subject to Thelluson's judgment. But as between Thelluson and the marshal, there was no privity of action. And this was the true ground for rendering the judgment of this Court, in the suit against the marshal.

It is true the special verdict introduces the assignees into the cause, as claiming the money raised by the marshal, on the supposition, that after satisfying the United States, they succeeded to the priority of the United States. But suppose this recovery had been had against Smith, what was there to prevent the assignees from going on at law, to recover the land of the vendee? They were no parties to the record, and there is nothing in the pleadings, or the verdict, to show that they had intervened, or had a right to intervene in the name of the United States. They could not maintain a right to succeed to the United States, under the provisions of the 65th section of the Act of 1799, 3 vol. p. 197; because that right is extended only to sureties upon the bond. If they had acquired any right as against the Thellusons, it was a mere general equity, which

could only have been asserted in a Court of Equity. At law, in this indirect mode, it could not have been asserted, if it could have availed them at all.

I, at least, would have it understood that I concurred in the judgment in the case of Thelluson *vs.* Smith, on no other ground than the want of privity between the parties. Nor can I acknowledge it as authority to any other point; since the United States were satisfied, and the assignees could not be regarded in any view, at law, as succeeding to the priority of the United States, if the United States had priority; and since that priority could not come in question, in a case in which the sale of the land was a mere nullity; as is distinctly affirmed in the present decision, because the assignment divested all the interest of the insolvent, so as to place it beyond the action of the *fieri facias*, issuing on the judgment of the United States.

Judgment affirmed, with costs.

The President, Directors and Company of the Bank of Columbia *vs.* Peter Hagner.

When no specific time for the payment of money is fixed in a contract by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. {463}

In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears. {464}

Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident the intimation of Courts have strongly favoured the latter construction, as being obviously the most just. {465}

In such cases, if either vendor or vendee, wish to compel the other to fulfil his contract; he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal. {465}

An averment of performance is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof. {465}

The time fixed for the performance of a contract, is, at law, deemed the essence of the contract, and if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end. But equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay, in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed. {465}

It may be laid down as a rule, that, at law, to entitle the vendor to recover the purchase money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance. And this averment must be sustained by proof; unless the tender has been waived by the purchaser. {467}

If before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed before the institution of a suit unnecessary. But this rule can never apply, except in cases where the act which is construed into a waiver, occurs *previous* to the time for performance. {467}

The taking possession of property by the vendee, before conveyance, is a circumstance from which is to be inferred that he considered the contract closed, but would not deprive him of the right to relinquish the property, if the vendor could not make a title or neglected to do so. After a relinquishment for such causes, the vendee could sustain an action to recover back the purchase money had it been paid. {468}

Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a Court of Equity to establish his title, notwith-

(Bank of Columbia vs. Hagner.)

standing a conveyance of all the right of the vendor to him, the Court will not compel him to pay the purchase money. It would be compelling him to take a law suit, instead of the land. {468}

THE plaintiffs instituted their suit in the Circuit Court for the county of Washington, against the defendant, on a special agreement to purchase two lots of ground in the city of Washington. The plaintiffs to support the issues joined on their part, offered in evidence certain deeds, papers and letters; the hand writing of the parties and the delivery of the letters, at their several dates, being admitted.

John Templeman, being indebted to the plaintiffs in a large amount, conveyed by deed, dated 31st March 1809, to Walter Smith, in trust to secure the debt, certain lots in the city of Washington, the two lots alleged to have been sold to the defendant included; the said trustee being authorized to sell, at *public sale*, the property conveyed.

On the 31st of March 1821, the bank, under seal, authorized Walter Smith to release the two lots to John Templeman, and under this authority the trustee conveyed the property to Templeman, who by deed dated 29th April 1821, conveyed the same to Peter Hagner, the defendant.

The conveyance, by Walter Smith to Templeman, and from Templeman to Mr. Hagner, were made by the direction of the bank, for the purpose of vesting a title to the two lots in Mr. Hagner, in execution of their part of the agreement upon which the suit was founded, and before the suit was commenced.

The material evidence offered by the plaintiffs to establish their claim upon Mr. Hagner, and to prove a contract made by him, for the purchase of the two lots was contained in a correspondence, &c. between General John Mason, the President of the Bank, and Mr. Hagner; commencing on the 14th May 1817, and ending on the 19th of May 1821, numbered from 1, to 11.

No. 1, dated 14th May 1817, letter, Peter Hagner to General Mason, expressed a wish to purchase the lots, if the bank was disposed to sell them, at a reasonable price—No. 2, from General Mason to Mr. Hagner, dated October 16th 1817, stated, that the Board of Directors had fixed the price of the lots at twenty-five cents per square foot—No. 3, from Mr. Hagner to General Mason, dated October 17th 1817, communicated an offer of ten cents per square foot, which, by letter dated 17th December 1817, No, 4, was extended to fifteen cents per square foot—No. 5, was a memorandum sent by Mr. Hagner to General Mason, to be signed by him, and which was so done, on the 27th of April 1818; the memorandum bearing date April

25th 1818, and stating that the lots were on that day sold to Mr. Hagner, at twenty-five cents per square foot; "payable at such periods as the bank may approve."

On the 27th April 1818, No. 6, Mr. Hagner wrote to General Mason, desiring to have the payments for the lots purchased by him, at twenty-five cents per square foot, to meet his income; and proposed to have the same divided into six quarterly payments, the first to be made on the first day of the following October; offering his notes, and asking for a deed; or if this should not be agreed to, stating that he would bind himself to pay the money as proposed, "and receive a bond of conveyance, conditioned to give a full title, when the money should be paid." This letter requested a return of the memorandum, No. 5.

Upon this letter, there was written, in pencil, in the handwriting of General Mason, according to the usual practice at the sittings of the Board of Directors, "accepted—interest on each note, as it becomes due"—No. 7, April 27th 1818, from General Mason to Mr. Hagner, enclosed the memorandum, No. 5, and mentions that his proposition would be submitted to the Board.

On the 7th October, 1818, Mr. Hagner wrote to Gen. Mason, (No. 8,) stating that he was prepared to pay the instalment falling due on the 1st October, and requesting a bond of conveyance. December 26, 1820, (No. 9,) Mr. Hagner, by letter, states that a long time had passed since his purchase, without the title to the lots having been completed; and the bank continues without authority to convey. The bank at the time of the purchase had no authority to sell at *private* sale, and must have made title by a circuitous and doubtful process of a public auction, at which some one might have interposed and obtained the lot. That the bank might have held him bound to take the property, although not reciprocally bound; and that the answer of the President of the Bank, was not certain and absolute, but was referred to and made dependent on the determination of the Board of Directors. Under these, and other circumstances stated by him, he communicates his determination to relinquish the purchase.

On the 8th May 1821, Mr. Hagner notifies General Mason, (No. 10,) that he considers his agreement to purchase the lots void, and that he has no claim or title to them. In reply to this letter, upon the 19th May 1821, (No. 11,) Gen. Mason says:—

"You will no doubt, Sir, recollect a conversation I had with you soon after the reception of your letter of the 26th December last, when I informed you that that letter had been submit-

ted to the Board of Directors, and that it had been determined that the purchase by you of the lots in question being considered in all respects a firm and *bona fide* purchase, it would not be relinquished, and that measures would be taken to make you a title valid in law. I am now instructed to inform you that those measures have been taken—that deeds to that effect have been made by the proper parties, which are expected to be soon received here, when they will be tendered you, and a compliance with your part of the contract expected."

Evidence was also given, on the part of the plaintiffs, to prove the entire insolvency of John Templeman, and the non-payment by him of any part of his debt to the plaintiffs. That on the 28th September 1821, a tender of the deeds already mentioned was made by an officer of the bank to the defendant, who refused to accept them. The deed of Templeman to Hagner, dated 3d of April 1821, was recorded by the consent without prejudice.

A witness also proved, that in the month of June 1818, he was employed by defendant to enclose the two lots in question, and did enclose them with a board fence: that before enclosing the said lots, an old house was pulled down by order of the defendant, and some part of the materials used in making the said enclosure; that some time afterwards, the witness was employed by defendant to pull down the fence, which was done, and the lots left open; that the said house was a small frame house, very old, and in bad repair; that it had been inhabited some time before, but was not in tenantable order and condition; that if the house had been put in good repair, which would have cost half as much as building a new house of the same size and kind, it would have rented for about three dollars per month.

The clerk of the Circuit Court of the District of Columbia certified that there was no judgment in force on the 30th day of March 1821 against John Templeman, and proof was also made that the taxes on the two lots of ground from 1809 to 1821 inclusive, had been assessed to, and paid by the Bank of Columbia.

On the 19th of May 1821, the situation of the lots was examined by order of the President of the bank, and it was found "that the fence had been removed apparently that spring, and the lots appeared to have been cultivated the fall before."

Upon this evidence the defendant, by his counsel, prayed the Court to instruct the jury, that upon the evidence, so given on the part of the plaintiffs, though found by the jury to be true as above stated, the plaintiffs are not entitled to recover in this

action the purchase money for the lots in the declaration mentioned; which instruction the Court gave as prayed.

The plaintiffs prayed the Court to instruct the jury, that upon the evidence the plaintiffs were entitled to recover such damages, as the jury should think the plaintiffs had sustained by the defendant refusing to comply with the contract stated in the declaration, if they should believe from the said evidence that the defendant consented to the delay on the part of the plaintiffs to make a deed, or give a bond of conveyance for the lots mentioned in the declaration; which instruction the Court refused to give.

A bill of exception was then tendered, by the counsel of the plaintiffs, to the instructions given by the Court on the prayers of the counsel for the defendant, and also to their refusal by the Court to give the instructions to the jury prayed for by the counsel for the plaintiffs.

While the bill of exceptions was preparing, the following additional evidence was discovered by the plaintiffs, and was offered and read to the jury:—

A deed, commissioners to J. Templeman 19th September 1801. Liber G. fol. 490.

A deed, Templeman & Stoddart to Bank of Columbia, 19th January 1802. H. 386.

A deed, Stoddart to Templeman, 25th September 1804. M. No. 12, 151.

A deed, Templeman to Bank of Columbia, 7th March 1807, No. 18, 346.

The deed of 7th March, 1807, conveyed *inter alia* to the plaintiffs the two lots alleged to have been sold by Mr. Hagner, and authorized the bank to sell the property vested in them by *private* or *public* sale.

This evidence being exhibited, the Court adhered to the instructions and opinions given to the jury, and an additional exception was taken thereto by the counsel for the plaintiffs, and a writ of error was prosecuted to this Court.

For the plaintiffs in error it was contended, that upon the evidence, the plaintiffs were entitled to recover, and that the Circuit Court ought to have so instructed the jury.

Mr. Key for the plaintiffs.

1. A contract for the purchase and sale of the two lots of ground was made between Mr. Hagner and the Bank of Columbia, the President of the bank having full authority from the Board of Directors to conclude the same. That the defendant had no evidence of the authority of the President to make the contract was his own neglect, and he dealt with him as the agent of the bank, and under the contract took possession of the property.

(Bank of Columbia *vs.* Hagner.)

By the contract the defendant was to pay for the lots, according to his proposition in the letter of the 27th of April 1817, and the acceptance "noted in pencil" is the agreement in writing by the bank to the terms proposed, of which, sufficient evidence exists, in addition to the circumstances of the defendant's entry on the lots, showing that he knew of the agreement of the bank.

2. The contract subsisted down to the period of the defendant's refusal to fulfil it.

It subsisted on the 7th October 1818, as shown by his letter referring to his propositions of payment upon the 27th April 1817; by his remaining in possession, and this continued until January 1820, when all the payments became due, no application having been made to complete the title, although it may be inferred that he knew some measures would be required for the purpose. The acquiescence of the defendant in the delay, bound him during its existence.

3. When on the 26th December 1820, he communicated his determination to withdraw from the contract, he had no such privilege. He was bound to wait, if the title was not incurably bad, a reasonable time until it should be completed. *Sugden*, 252-3-4-5. If aware of the difficulties in the title arising from the sale made under the deed of trust by Walter Smith, by which a *public* and not a *private sale* of the lots was to be made, he should have tendered performance on his part and demanded performance of the vendors. Instead of this, if by that letter he intended to renounce at once, this could not be done, legally, unless in the case of an incurably bad title. The formal relinquishment is made on the 8th of May 1821, and this being the first complaint of non-performance by the bank, it was promptly attended to. Cited *Sugden on Vendors*, 157. 249-50-51-52—34, 35. The refusal on the part of the defendant made a tender of performance by the plaintiffs, previous to a bill of specific performance on this action; unnecessary. *Sugden*, 162, 163. 3 *Douglass*, 684. But no such tender was necessary. *Sugden on Vendors*, 160, 164.

The bank did offer a good title, as is shown by the evidence. Templeman had no ultimate interest; it was released, and his deed made with the consent of the bank, gave a good title. Those who are entitled to the money, which may arise from the sale of an estate are the substantial owners of it. *Sugden*, 300. To sustain this suit, it is sufficient if a good title can *now* be made, and this can be done under the deed of 7th March, 1807. *Sugden*, 250-1.

Mr. Jones for the defendant.

1. There never was a complete contract entered into by Mr.

Hagner. He made propositions, and they were never fully accepted by the bank; nor was he at any time informed of the order or determination of the bank thereon. It was the duty of the plaintiffs, when the money became due, to have tendered a performance of their contract, and not to have postponed the same until September, 1821, the day before the action was instituted.

No purchaser is bound to take an equitable title, and in this case the bank had not a legal title under the conveyance to Walter Smith, under which the title tendered was derived. The title must be complete at the time of performance of the contract. *Sugden on Vendors*, 158.

When the original security is in form of a trust, it must remain so until the trust is executed, by a sale of the property in the time prescribed.

A Court of Equity would not have confirmed the title to the defendant, they would have said to the trustee Walter Smith, go and execute your trust.

As to the title of the 28th of September 1821, tendered to the defendant, it was not a valid title. By the law of Maryland, no land can be conveyed by a power of attorney; it was not made by the bank, and it passed through Templeman, who was insolvent. The defendant could not be compelled to accept such a title. There is no authority to be found by which a vendor can call on another to complete a title which he contracted to give.

Entry on the property does not furnish any thing but a presumption, that a title would be made; and this was never done.

As to the time which will be allowed for completing a title, the following cases were cited. *Sugden on Vend.* 284. 1 *Marshall*, 583. 6 *Taunt.* 259. 5 *East*, 198. 1 *Smith's Rep.* 390.

The plaintiffs after the case had gone to the jury, exhibited a new title. The first was as a creditor, and the conveyance was to be derived from the trustee; the second title was under an old deed, by which the bank was authorized to convey. The deed of 1807 was controlled or revoked by the subsequent deed; and notwithstanding that deed, the trustee alone could make the sale. 1 *Marshall*, 285. 5 *Taunt.* 282. 3 *Bos. & Pull.* 181.

Mr. Justice THOMPSON delivered the opinion of the Court.—

This case comes up from the Circuit Court of the District of Columbia, upon a writ of error. It was an action against the defendant Hagner, on a special agreement to purchase of the plaintiffs two lots of ground in the city of Washington. The

Court below, on the prayer of the defendant, instructed the jury, that upon the evidence given on the part of the plaintiffs, though found by them to be true, would not entitle the plaintiffs to recover, in this action, the purchase money for the lots mentioned in the declaration. Under which instruction a verdict was found, and judgment rendered for the defendant; to reverse which, the present writ of error has been brought.

The special agreement as stated in the declaration, is substantially, that on the 25th of April, 1818, it was agreed between the plaintiffs and defendant, that the plaintiffs should sell to defendant lots No. 1 and 2, in square 141, in the city of Washington, the property of the plaintiffs, at and for the price of twenty-five cents, for each and every square foot, contained in said lots; and that defendant agreed to purchase the lots, at that price, and to pay for the same, when thereunto required by the plaintiffs; setting out the quantity of land and amount of the purchase money, with an averment, that the plaintiffs had full power and authority to make the sale, and that they then were, and ever since have been fully competent and able to make and deliver, a good and sufficient deed, conveying to the defendant a good title in fee, to said lots. And that afterwards, on or about the 8th day of May, 1821, the defendant declared and gave notice to the plaintiffs, that he considered the agreement and sale void, and would not comply with the same, and discharged the plaintiffs from making or causing to be made any deed of conveyance, and the plaintiffs further aver, that afterwards, on the 28th September, in the year 1821, they being willing and able to make a conveyance of a good title to said lots, offered so to do, and requested the defendant to pay the purchase money, according to the terms of the agreement, which he refused to do. The first inquiry that naturally arises, is, whether any contract was in point of fact concluded between the parties. It has been objected, that it does not appear that General Mason, through whom, in behalf of the bank, the negotiation was carried on, had any authority for that purpose. There is certainly great plausibility in this objection. There is no evidence, expressly showing such authority. But this perhaps ought to be considered as having been waived by the defendant; as that part of the correspondence from which the contract is supposed to be collected, was carried on with him in his official character of President of the Bank. And the defendant, at no time, puts his objection to carrying the contract, (if any was made,) into execution, upon the want of authority in Mason, to make it.

The contract is alleged, in the declaration, to have been made on the 25th of April, 1818, and the letter of Mason, of

that date, and signed by him, as President of the Bank, has been considered as closing the contract. This letter is as follows:—

"I have this day sold to Peter Hagner, of Washington City, lots No. 1 and 2 in square 141 in Washington City, and belonging to the Bank of Columbia, at twenty-five cents per square foot; payable at such *periods* as the bank may approve."

The time of payment being left to the option of the bank, it is said, that in judgment of law, the purchase money was payable on demand; and this is no doubt true, if the bank had then closed the negotiation, and apprized the defendant that such was their determination, as to the payment of the purchase money. But this was not done; and the terms of the letter look to, and necessarily imply some further negotiation. The payment was to be at such *periods* as the bank may *approve*. It was therefore clearly understood to be payable, by instalments; and the periods to be approved by the bank, which would seem to leave the subject open to propositions to be made on the part of Hagner, and submitted to the bank to be approved. And that such was the understanding of the parties, is evident from the letter written by the defendant, two days after, April 27th, 1818, to the President of the bank, as follows:

"It would be desirable to me to have the payments to make for the lots No. 1 and 2 in square 141 purchased of you by me on Saturday, at 25 cents per square foot, in proportions, and at *periods*, to be met by my income. I accordingly propose that the whole amount of the purchase money be divided into six quarterly payments, the first to be on the first of October next. If this be *approved* by the bank, I will give my notes, and I presume the bank will have no objections to give me a deed. If however it be preferred, I will bind myself to pay the money, at the times stated above, and receive a bond of conveyance, conditional to give a full title, when the money is paid. Do me the favour to send me, in return, a memorandum of our agreement on Saturday." Upon this letter was written in pencil, by General Mason "accept. interest on each note as it becomes due."

Whatever, therefore, might have been the right of the bank to have closed the contract, in the terms of the letter of the 25th of April, it was certainly waived by an acceptance of the modification, contained in the letter of the 27th of April. Nor would any contract seem to be closed by this letter. It contained two distinct propositions, by the defendant; the one to give his notes for the purchase money, payable in six quarterly payments, the first to be made on the 1st of October then next, and

take a deed from the bank: the other, to bind himself to pay the money at the times stated, and take a bond for a deed, to be given when the whole purchase money was paid. This necessarily required some further answer from the plaintiffs, not only to signify their election between the propositions; but to do some further act, in confirmation of such election. Either to give the deed, or a bond for the deed. The note in pencil, made by the President of the bank, upon the letter, could not fairly be understood, as implying any thing more than an acceptance of the proposition to pay by instalments; and settling the terms of the contract, to be concluded between the parties upon the bank's electing, which proposition to accept, as to the mode of concluding the contract. But the contract could not be said to be consummated, until such election was made and the writings executed.

Here the matter rested for nearly three years, without any thing being done on the part of the bank to close the contract; or to intimate, that they considered any contract in force, in relation to the purchase; and, that, not until after the defendant had given them formal notice, that he considered the agreement void, and at an end.

And he certainly had very good reason to think the bank so considered it. Or that no agreement had in fact ever been concluded. For the defendant by his letter of the 7th of October 1818, gave the plaintiffs notice that he was prepared to pay the first instalment; which according to his proposition fell due on the first of that month; and requesting of them a bond for a deed; to which no answer appears to have been given, nor any one of the instruments paid or demanded; although the whole purchase money became payable by the first of January 1820, according to the proposed terms of the contract.

Upon this view of the case, it is at least very doubtful, whether any contract was concluded between the parties; and if the cause turned upon this point alone, the judgment of the Court below would be affirmed, by a division of opinion in this Court. But, as there are other questions in the cause, the determination of which leads to the same result, and upon which no difference of opinion exists, it has been thought proper to notice them.

Admitting, then, that a contract was entered into between the parties, the inquiry arises, whether the plaintiffs have shown such a performance on their part, as will entitle them, in a Court of Law, to sustain an action for the recovery of the purchase money.

In contracts of this description, the undertakings of the respective parties are always considered dependent, unless a cou-

trary intention clearly appears. A different construction would in many cases lead to the greatest injustice, and a purchaser might have payment of the consideration money enforced upon him, and yet be disabled from procuring the property, for which he paid it.

Although many nice distinctions are to be found in the books, upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent, or dependent; yet it is evident, the inclination of Courts has strongly favoured the latter construction, as being obviously the most just. The seller ought not to be compelled to part with his property, without receiving the consideration: nor the purchaser to part with his money, without an equivalent in return. Hence, in such cases, if either a vendor or a vendee wish to compel the other to fulfil his contract, he must make his part of the agreement precedent, and cannot proceed against the other without an actual performance of the agreement, on his part, or a tender and refusal. And an averment to that effect, is always made in the declaration upon contracts, containing dependent undertakings, and that averment must be supported by proof. And that the one now before the Court, must be considered a contract of this description, cannot admit of a doubt.

The plaintiffs, however, aver that they were willing and able to make a conveyance of a good title, and offered so to do on the 28th day of September 1821; but this was only the day before the suit was commenced, and nearly two years after the time fixed for performance; and they set up, as an excuse for the delay in making the tender of a deed, the notice received from the defendant on the 8th of May 1821; that he considered the agreement void, and refused to carry it into effect.

The time fixed for performance, is, at law, deemed of the essence of the contract. And if the seller is not ready and able to perform his part of the agreement, on that day, the purchaser may elect to consider the contract at an end. In *Sugden's Law of Vendors*, 275, it is said—"The general opinion has always been, that the day fixed was imperative on the parties at law. This was so laid down by Lord Kenyon, and has never been doubted in practice. The contrary rule would lead to endless difficulties, if in every case it must be referred to a jury to consider, whether the act was done within a reasonable time; and the precise contract of the parties would be avoided, in order to introduce an uncertain rule, which would lead to endless litigation. But equity, which from its peculiar jurisdiction, is enabled to examine into the cause of delay in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agree-

ment into execution, although the time appointed has elapsed.' But he justly adds, perhaps there is cause to regret, that even equity assumed this power of dispensing with the literal performance of contracts, in cases like those.

It was urged, at the bar, that the rule on this subject was the same at law and in equity, and the case of Thompson *vs.* Miles, (1 *Esp. Ca.* 184,) was referred to in support of this proposition. And it is true, that some of the remaks which fell from Lord Kenyon, on the trial of that cause, would seem to countenance such an opinion. For he permitted the seller to prove, he had a good title; although the power of making that title was attained after the action was brought.

This was certainly going great lengths for a Court of Law. But it ought to be observed, that in that case no time appears to have been fixed for completing the contract; and an application for the title had not been made by the purchaser, previous to the action brought by the vendor for breach of the contract; which it seems was considered necessary in that case. But, that Lord Kenyon did not mean to be understood, as holding that the evidence would have been admissible to sustain the action, if there had been a time fixed for the performance of the contract, is very evident from his doctrine in numerous other cases before him. Thus in the case of Bury *vs.* Young (2 *Esp. Ca.* 641,) he says, a seller of an estate ought to be prepared to produce his title deeds at the particular day. That a Court of Equity will under particular circumstances, enlarge the time. And in the case of Cornish *vs.* Rowley (1 *Wheaton Selwyn* 137,) the action was for money had and received, to recover back money paid as a deposit on an agreement for the purchase of an estate, the defendant having failed to make out a good title, *on the day* when the purchase was to be completed; the counsel for the defendant said they were ready to make out a good title; to which Lord Kenyon replied. "As to the sentiments I have long entertained relative to the purchase of real estate, I find no reason for receding from them; they have been confirmed by conversing with those whose authority is much greater than mine. The vendor must be prepared to make out a good title *on the day* when the title is to become completed." On which the counsel for the defendant asked, "Do I understand your Lordship to say, that though the defendant can *now* make out a good title, yet, as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance." To which Lord Kenyon answered, "He certainly may; and avoid the contract:" and he directed the jury to find a verdict for the plaintiff, for the deposit money.

In the case of Davis *vs.* Hone (2 *Sch. & Lef.* 347) Lord Redesdale said, a Court of Equity frequently decrees specific per-

formance, when the action at law has been lost by the default of the very party seeking the specific performance. To sustain an action at law, performance must be averred, according to the very terms of the contract. And again in the case of Lennon *vs.* Napper (2 *Sch. & Lef.* 684) he reiterates the same doctrine, that Courts of Equity in all cases of contracts for lands, have been in the habit of relieving, where the party from his own neglect, had suffered a lapse of time, and from that and other circumstances, could not sustain an action to recover damages, at law; for, at law, the party plaintiff, must have strictly performed his part of the contract. And in the case of Wilde *vs.* Fort, and others, (4 *Taunt.* 334,) the rule is recognised, that if the vendor of an estate at auction, does not show a clear title by the day specified, the purchaser may recover back his deposit, and rescind the contract; without waiting to see whether the vendor may ultimately be able to establish a good title or not. A purchaser is not bound to accept a doubtful title.

From these authorities it may be laid down as a settled rule, that at law, to entitle the vendor to recover the purchase money, he must aver in his declaration a performance of the contract on his part, or an offer to perform at the day specified for the performance. And this averment must be sustained by proofs, unless the tender has been waived by the purchaser.

The time fixed for the performance of the contract, in this case, must be understood to have been the 1st of January 1820. The payment of the consideration money was to have been completed on that day, and no part of it having been paid, the defendant had a right to abandon his contract, unless the plaintiffs were then ready and offered to perform, on their part, of which there was no evidence, whatever, offered upon the trial. They have attempted, however, to show, that a tender of a deed was rendered unnecessary, by reason of the letter of the defendant of the 8th of May 1821; in which he gave notice of rescinding the contract. But this letter can have no such effect. It was written sixteen months after the time fixed for the delivery of the deed, and when the defendant had a right to rescind the contract. If before the period had arrived, when the deed was to be delivered, the defendant had declared he would not receive it, and that he intended to abandon the contract, it might have dispensed with the necessity of a tender, as the conduct of the defendant might in such case, have prevented the act from being done; and he who prevents a thing from being done, shall never be permitted to avail himself of the non-performance, which he himself has occasioned. But that rule can never apply, except in cases where the act which

is construed into a waiver, occurs previous to the time fixed for performance.

The possession taken of the lots by the defendant, could, at most, only, be considered a circumstance from which to infer, that he considered the contract closed; but could not deprive him of the right of relinquishing it, and restoring the possession, if the plaintiffs were unable to make a title to him, or neglected to do it. The possession was taken, doubtless, under a belief that the contract would be performed by the plaintiffs, and a full title conveyed to him; but if the contract was unexecuted, the defendant had a right to disaffirm it, and restore the possession; and would have sustained an action to recover back the purchase money, had it been paid. (*Sug. on Vend.* 173. 183, and cases there cited.)

The plaintiffs have therefore clearly failed to show such a performance, on their part, as to entitle them, in a Court of Law, to call upon the defendant for payment of the purchase money.

But admitting, that no objection in point of time lay to the tender of the deeds, the day before the commencement of the present action; no title was thereby conveyed to the defendant, or at all events, not such a one as he would at any time have been bound to accept. It was a title derived from John Templeman, under the deed of the 31st of March 1809. Whereas Templeman had previously conveyed the same lots to the plaintiffs, by his deed of 7th of March 1807, in trust, with authority to sell the same for the payment of a debt, due to the bank, and to pay over to him the supplies, if any there should be. The legal title to these lots is therefore still in the bank, and may be subject to the trust declared in the deed, from any thing, that appeared upon the trial. And to allow the bank to recover the purchase money, and turn the defendant over to a Court of Chancery, to obtain a title, would be going farther than any known principles in Courts of Law will warrant; no act whatever having been done by the plaintiffs, to transfer to the defendant the title vested in them under the deed of 1807.

To substantiate the present action under such circumstances, would be compelling the defendant to take a law-suit, instead of the land, for which he contracted.

Judgment affirmed, with costs.

DOE ON THE DEMISE OF JOHN A. ELMORE, PLAINTIFF IN ERROR, *vs.* WILLIAM A. GRYMES, AND JOHN J. BEATIE, DEFENDANTS IN ERROR.

The Courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on the trial of a cause before a jury. The plaintiff might agree to a nonsuit, but if he do not so choose, the Court cannot compel him to submit to it. {471}

When the state of the record did not show a judgment of nonsuit to have been entered, although the bill of exceptions states the fact, the plaintiff may apply for a *certiorari* to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. {472}

AN action of ejectment was instituted in the Circuit Court of the United States for the District of Georgia, for the recovery of 287½ acres of land, in which the plaintiffs claimed title as follows: A grant from the state of Georgia to Samuel Alexander: and a deed from John Cessna, styling himself "Sheriff of Greene county in the state of Georgia," purporting to convey to Buckner Harris, by virtue of a sale under an execution against Herod Gibbs, "two hundred and eighty-seven and a half acres of land in said county, on Little Beaver Dam, on the waters of Richland creek, and bounded on Academy lands, and land belonging to William Alexander, which land was formerly the property of Samuel Alexander:" a deed from Buckner Harris to Ezekiel E. Park, for a tract of land "containing two hundred and eighty-seven and a half acres, in the county of Greene, and state of Georgia, on the Little Beaver Dam of Richland creek; being an equal half of the double bounty of land granted to Samuel Alexander, adjoining Academy lands."

The plaintiff then introduced a witness, who testified that "Ezekiel Park was in possession of a tract of land lying in Greene county, usually called Park's old mill tract, on Beaver Dam creek, for about twenty years." He then produced a deed from Ezekiel E. Park to John A. Elmore, for a tract of land "in the county of Greene, and state of Georgia, on the Little Beaver Dam creek, or fork of Richland creek, being one equal half of a double bounty tract, originally granted to Samuel Alexander, adjoining lands belonging to the University; being the same originally sold and conveyed to Herod Gibbs, by the grantee, on the 14th of March, 1790." He then exhibited a deposition of the county surveyor, stating that he had made a re-survey of the premises in dispute, agreeably to a plot annexed to his deposition, which corresponded in its outlines with that annexed to the original grant, "completely

covering the premises in dispute;" which he designated on the plat.

The plaintiff then called a witness, who testified that W. A. Grymes was in possession of the premises at the commencement of the action, and then closed his testimony.

The defendant's counsel, thereupon, moved for a nonsuit, on the following grounds:

1st. Because the plaintiff had failed to make out his title by the documentary evidence on which he rested his case.

2d. Because there was no sufficient evidence of possession, to give a title, under and by force of the statute of limitations of Georgia.

The Circuit Court ordered a nonsuit to be entered, against the consent of the plaintiff; and a writ of error was prosecuted by him, and the cause brought before this Court.

Upon the judgment of nonsuit, the defendants in error claimed to maintain before the Court—

That the Circuit Court had power to order a nonsuit, without the assent of the plaintiff.

The case was argued by Mr. Wild and Mr. M'Duffie for the plaintiff in error, and by Mr. Berrien for the defendant.

Mr. Berrien.—

The doctrine laid down in the books of practice, and adopted in some of the state Courts, is not supported by any express decision in the Courts of Great Britain. That proposition is, that a plaintiff, on the bare allegations of his declaration, without a tittle of proof, is entitled to demand the verdict of a jury in his cause.

Any modification of this proposition *admits the power*, and objects only to the *mode of its exercise.* An examination of the adjudged cases in England will show that they do not warrant the position. Watkins *vs.* Towers, 2 *T. R.* 275, was a motion to enter nonsuit after verdict.

Santler *vs.* Heard, was a verdict taken subject to the opinion of the Court, whether plaintiff ought not to have been nonsuited. 2 *Bl. Rep.* 1031. 2 *Salk.* 669.

Macbeth *vs.* Haldermand, 1 *T. R.* 172. *The point was not made,* on a motion for a new trial. On reporting the fact, *Buller J.* said, that on the trial, he had thought the plaintiff ought to be nonsuited; but his counsel appearing, when plaintiff was called, he had left the question to the jury. It is said—that the plaintiff would be deprived of his writ of error to this Court. This is not so.

Final judgments spoken of in the judicial Act, are meant to be contradistinguished from interlocutory judgments.

Any judgment which is *final* in the *suit*, though not final, as

(Doe on the demise of Elmore *vs.* Grymes et al.)

between the parties, with the exceptions mentioned in the Act, may be brought here by writ of error.

A judgment of nonsuit is such a judgment, and may be the foundation of a writ of error. The defendant is entitled to judgment and execution for costs. The suit is finally disposed of. It is a final judgment in a civil action. In England, error lies on such a judgment. Box *vs.* Bennet, 1 *H. Bl.* 432. Kempland *vs.* Macauley, 4 *T. R.* 436. Evans *vs.* Phillips, 4 *Wheat.* 73, does not contradict this. The ground of that decision was that the plaintiff had assented to the nonsuit. Why may not the errors of the Court below, be corrected in this form, as well as by an exception to instructions, or the refusal to give them.

Mr. Wilde and Mr. M'Duffie, for the plaintiff in error.—

1. It has always been considered that a nonsuit cannot be ordered without the consent of the plaintiff, who has a right to submit his case to a jury and the Court; and the Court, should the jury err, may order a new trial.

In the Courts of the United States, another obligation exists to the exercise of such a power, as the Court has decided that a writ of error will not lie on a judgment of nonsuit; (Evans *vs.* Phillips, 73,) it not being a *final judgment*. If the Courts below should have this power, a plaintiff may be prevented the opportunity of bringing his case before the highest judicial tribunal of the United States. If a Court, can in any instance order a nonsuit against the consent of the plaintiff, it may only be when no questions of facts are involved, but the only matter before the Court is a question of law. This case exhibits facts upon which a jury were the proper judges. The plaintiff claimed the land by possession, this, and the extent of the possession, was exclusively for the consideration of the jury.

The practice of the state of Georgia as to the entry of nonsuits, has been fluctuating. The judicial system of that state does not comprehend an appellate Court, with exclusive final judicial powers, but each Circuit Court has a right of granting appeals to itself, and on such appeals a second trial takes place. Hence, this point has been decided differently in different Courts, and at different periods; and hence the practice of the Courts of Georgia is unsettled, and as various, as it necessarily must be, in the absence of a Supreme Court to regulate and determine the same.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

The Court has had this case under its consideration, and is of opinion that the Circuit Court had no authority to order a peremptory nonsuit, against the will of the plaintiff. He had

a right by law to a trial by a jury, and to have had the case submitted to them. He might agree to a nonsuit; but if he did not so choose, the Court could not compel him to submit to it. But the state of the record does not enable this Court to render a final judgment, because the record is defective, in not showing a judgment of nonsuit, entered in the Circuit Court. Although the bill of exceptions states that fact yet the record does not contain the judgment itself.

The plaintiff may therefore apply for a *certiorari*, to bring up a perfect record, or dismiss the present writ of error and proceed anew; as his counsel may think best for the interest of their client.

Mr. Justice JOHNSON *dissentiente*—

The only question of any importance in this cause, is, whether a Circuit Court can, in any case, order a plaintiff to be nonsuited. I ordered the plaintiff below to be nonsuited, because the evidence was so inadequate to maintain his suit; but had the jury found for him, I should have set aside the verdict, and ordered a new trial. The practice of the Court from which this cause comes up, is this; when the plaintiff has closed his evidence, the defendant is at liberty to move for a nonsuit, or proceed with his testimony. If he introduces evidence, it is too late to move for a nonsuit; and the question always to be examined is, whether upon the evidence introduced by the plaintiff, admitting it to be true, the jury can find a verdict for him. So that, it is in fact, a substitute for a demurrer to evidence, or for a motion for instruction, that the plaintiff cannot recover, upon the case made out by him in evidence.

There are several reasons, why I must maintain that the Courts of the sixth Circuit have a right to exercise the power to order a nonsuit, even against the will of the plaintiff; and why it would be wise, in all our Circuits, to introduce the same practice.

It happens unfortunately for the defendant in error here, that a majority of the Judges of this Court have pursued a different practice in their Circuits; but this, I must insist, is no sufficient reason for subverting, otherwise than by rule, the practice of other states in which this right has been recognised in the administration of justice, coevally with the existence of their Courts. Such has been the case in the states of which the sixth Circuit consists, and the Acts of 1789 and 1792, have adopted into the Courts of the United States, of the respective Circuits, not only the forms of process, but the "modes of proceeding," in suits known to the states respectively. That this comes under the denomination of a mode of proceeding, or in other words, an established practice of the state composing the sixth Circuit, appears to me incontrovertible.

(Doe on the demise of Elmore vs. Grymes et al.)

By what right then can this Court reverse a judgment of that Circuit, founded in a practice thus sanctioned by law? It does seem to me, that the defendant below has a right in this judgment, vested by express statute law, and ought not to be put to the expense of this reversal. For what purpose is power given to this Court to alter the practice of the Circuits, by such regulations as they may deem expedient, if such practice is not to be held legal, until altered by a rule of this Court?

This Court surely does not mean to decide, that such was not the received practice of that Circuit; this would be a decision in the teeth of positive fact; and if the purport of the decision be, that it is an illegal practice, the immemorial practice itself, and the Process Acts of the United States, furnish an express negative, to such a decision.

The idea seems to be, that it is a practice inconsistent with the relation in which our Circuit Courts stand to this Court—that ours is not a *Nisi Prius* system, or something to that effect. What then? This Court can alter the practice by a rule, but, to overturn a judgment, that has already been rendered under such a practice, I must respectfully contend, approaches very near to *ex post facto* legislation, not adjudication; the province of which is to operate only upon existing laws. But it is not a practice appropriate exclusively to a *Nisi Prius* system, as is proved by this, that writs of error are sued out continually in England, upon judgments, on nonsuits, (see the cases cited in 1 *Archb. Practice*, 229–30,) and, though it had been, the states were at liberty to adopt it into their practice, although the *Nisi Prius* system be unknown to them. That they had adopted it, is conclusive against this assumed incompatibility. And in practice it subserves the purposes of justice under our system, as effectually as a bill of exceptions, or a demurrer to evidence; and in several respects much better. It saves the practitioner from the weight of responsibility, which often results from being compelled to elect between a voluntary nonsuit, and a demurrer to evidence, or a bill of exceptions, which may terminate fatally to his client; and it not unfrequently saves his client from the fatal effects of negligence and misapprehension, either of himself or his attorney, or from surprise.

In point of convenience and expedition, in the administration of justice, I presume there cannot be two opinions. On this point, as far as *exemplum docet*, we may cite Great Britain, Massachusetts and New-York, with some confidence, against Pennsylvania, Maryland, and Virginia.

But, it is contended, that in England the plaintiff is not nonsuited, if he insists on answering when called. If the fact be admitted, what then? England is not altogether absolute in dictating to the Courts of the United States, and if those of the

states of the sixth Circuit, have asserted some independence in their rules of practice on this subject, I presume their right was unquestionable to do so.

But I want no other authority than the Courts of Great Britain, to justify the practice of the sixth Circuit, in this behalf. From the earliest period we find the English Courts, in the exercise of this power, and whoever will examine the cases collected in Mr. Morgan's Treatise on the doctrine of new trials, (3 *vol. Essays,*) will find, what a very wide range has been taken by those Courts in the application of that practice. Nor have the more modern cases manifested any inclination to retrace their steps. Its salutary effects are universally felt, and perhaps contribute as largely as any other cause to the rapid progress of their Courts in disposing of their dockets. If there exists any case prior to that of Macbeth *vs.* Haldeman, 1 *Term R.* 172, in which the right of the plaintiff to refuse to be nonsuited was recognised, I cannot recollect it; since in that case it would seem that in ordinary cases the right is recognised. But there is abundant proof that the British Courts do assert the power to control the exercise of that right, by the plaintiff, when they think proper. In the cases of change of *venue*, on motion of plaintiffs, 3 *Black.* 1031, the right is disputed, on the assumed ground that he undertakes to prove some material fact. Now, where can be the objection to applying the same reason to every case that goes to a jury? Does not a plaintiff, in fact, undertake the same thing whenever he troubles a Court with his suit, and has a jury sworn to try his cause upon evidence? he is no longer subjected to amercement if he fails to recover, and the right to nonsuit him, where he fails to produce evidence that will justify a verdict, is but a reasonable substitute for the absolute penalty to which he was once subjected.

But it is contended that an absurdity is produced, and an acknowledged right violated. Yet the alternative exhibits a more direct and obvious absurdity, since in the case of Macbeth *vs.* Haldeman, and in every case of the kind, the Court asserts a positive control over the consciences of the jury, by telling them, "they are bound to find for the defendant." And the greater absurdity must henceforward be incurred, of swearing a jury in a cause, and requiring a verdict at the caprice of a plaintiff, who produces not a tittle of evidence to maintain his issue. Nor is any right of the plaintiff taken from him, if his rights be regarded in their just extent. He cannot claim a verdict of the jury if he does not produce evidence to sustain it, and it is only in that case that he is precluded from submitting his case to their consciences. When we consider what were the ancient penalties for a false verdict, before they were superseded by the introduction of new trials; it must appear just

and reasonable, that the plaintiff should rather be exposed to the necessity of bringing a new suit, or moving for a new trial, than that the jury should be subjected to attaint, at his will. And on the subject of fiction, and legal absurdity, it is certainly too late at this day for our Courts of Justice to be very fastidious, on a consideration which has been so thoroughly set at nought, by the action of ejectment, fine and recovery, and sundry other, matters of the kind; to which they have resorted for the purposes of substantial justice and public convenience.

I must submit, I suppose, but I cannot do it without protesting against the right of forcing upon my Circuit, the practice of other Circuits in this mode.

By a rule of this Court, it is, unquestionably, in the power of the Court to do it. But until then, I can never know what is the practice of my own Circuit; until I come here to learn it.

JAMES D'WOLF, JUNIOR, PLAINTIFF IN ERROR, *vs.* DAVID JACQUES RABAUD, JEAN PHILIPPE FREDERICK RABAUD, ALPHONSE MARC RABAUD, ALIENS, AND SUBJECTS OF THE KING OF FRANCE, AND ANDREW E. BELKNAP, A CITIZEN OF THE STATE OF MASSACHUSETTS, DEFENDANTS IN ERROR.

A nonsuit may not be ordered by the Court, in any case, without the consent and acquiescence of the plaintiff. {497}

A question of the citizenship of a party to a cause, cannot constitute a part of the issue on the merits; and must be brought forward by a proper plea in abatement, in an earlier stage of the cause, than the trial on the merits. {498}

The statute of Frauds of New-York, is a transcript on this subject, of the statute 29 Charles, 2d ch. 3. It declares, that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another; unless the agreement, or some memorandum, or note thereof, be in the writing and signed by the party, or by some one by him authorized. The words "collateral" or "original" promise, do not occur in the statute; and have been introduced by Courts to explain its objects, and expound its true interpretation. {499}

Whether, by the true intent of the statute of Frauds, it was to extend to cases where the collateral promise, (so called,) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding; might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination; at least in those states, where the English authorities have been fully recognised and adopted in practice. {499}

If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressly upon the understanding that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract. The contract of B to repay the money, is not coincident with, nor the same contract with C to do the act. Each is an original promise; though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of either B or C, but upon the promise of both *diverso intuitu*, and each becomes liable to A, not upon a joint, but a several original undertaking. Each is a direct original promise, founded upon the same consideration. {500}

The case of Wain *vs.* Warlters, (5 *East* 10,) was the first case which settled the point, that it was necessary in order to escape from the statute of Frauds, that the agreement should contain the consideration for the promise as well as the promise itself. If it contain it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. That case has been adopted, to a limited extent, by the Courts of New-York into its jurisprudence, as a sound construction of the statute. {501}

(D'Wolf vs. Rabaud et al.)

The decisions in the Courts of New-York on the construction of its own statute, and the extent of the rules deduced from it, present to this Court a guide in its decisions upon the construction of their statute. {501}

ERROR to the Circuit Court of New-York, for the Southern District.

The defendants in error, brought an action of *assumpsit*, in the Circuit Court of the United States for the Southern District of New-York, against the plaintiff in error, to recover damages for the breach of his contract, to ship to them, at Marseilles, five hundred boxes of white Havana sugar.

The declaration contains several special counts; of which the first and second only were relied upon at the trial.

The first count stated, that at the time of making the respective promises and undertakings of the defendant, the plaintiffs were co-partners in trade, carrying on business at Marseilles in France, under the firm of Rabaud, brothers and company. That one George D'Wolf, of Bristol, Rhode Island, being desirous of drawing upon the plaintiffs at Marseilles, for 100,000 francs; on the 15th March 1825, at New-York, in consideration that the plaintiffs, at the special instance and request of the defendant, would authorize the said George D'Wolf to draw bills of exchange upon the plaintiffs for the said sum of 100,000 francs, the defendant undertook, and promised, that he would ship for the account of George D'Wolf, on board of such vessel as George D'Wolf should direct, five hundred boxes of white Havana sugars, consigned to the plaintiffs at Marseilles, and the plaintiffs afterwards did duly authorize George D'Wolf to draw bills of exchange upon them at Marseilles, for the said sum of 100,000 francs, which bills were drawn by him on the 16th of November 1825, and paid by the plaintiffs on the 3d day of March 1826. That on the 4th day of January 1825, at the city of New-York, George D'Wolf did direct and name a vessel, the brig Quito, then laying in the port of New-York, and ready to receive the said sugars, on board of which vessel the sugar should and ought to have been shipped, by the defendant, on account of George D'Wolf, and consigned to the plaintiffs at Marseilles, according to his said promise and undertaking; of all which promises the defendant had notice; and although he was then and there requested to ship the sugar on board the said vessel, yet he did wholly refuse the same.

The second count differs from the first only in stating the contract to have been, that, "in consideration that the plaintiffs, at the request of the defendant, would authorize George D'Wolf to draw bills of exchange upon them at Marseilles, for another sum of 100,000 francs, on account of other five hundred

boxes of white Havana sugar, to be shipped by the defendant for account of George D'Wolf, on board of such vessel as George D'Wolf should direct, and consigned to them the plaintiffs at Marseilles, the defendant undertook, &c." and averring, that relying on the promise and undertaking of the defendant so made, they, the plaintiffs, after the making thereof, did duly authorize George D'Wolf to draw bills of exchange upon them for another sum of 100,000 francs, on account of the last mentioned five hundred boxes of white Havana sugars, to be shipped by the defendant on account of George D'Wolf, and consigned to the plaintiffs at Marseilles.

The cause was tried at the October term of the Circuit Court of the United States, for the Southern District of New-York, in 1826, when the jury, under the charge of the Court found a verdict for the plaintiffs below for $19,950 85. The opinion of the Court, in the charge to the jury, was excepted to by the counsel for the defendant, and a bill of exceptions sealed by Mr. Justice Thomson, sitting as Judge of the Circuit Court; and the opinion delivered by him, states the evidence adduced in the cause.

On the trial of the cause in the Circuit Court, the plaintiffs below, gave evidence, by the testimony of George D'Wolf, who was examined under a commission at Havana, that he George D'Wolf, had several transactions with the plaintiffs previous to that which gave rise to this suit, and had at various times drawn bills on them. That he had three interviews with Mr. Belknap, on the subject of the shipment of the sugars; which interviews were had, first in Wall street in the city of New York; secondly, at the counting house of James D'Wolf, Jun., the plaintiff in error; and thirdly at the boarding house of Mr. Belknap. James D'Wolf, Jun. was present at the first interview, and he with a certain Frederick G. Bull was present at the second, at his counting house.

Mr. George D'Wolf stated, that the transactions relative to the shipment of the sugars were; that, in Wall street, he proposed to Mr. Belknap to address him five hundred boxes of sugars to the house at Marseilles, on receiving authority to draw on account of the same, to the extent of 100,000 francs. Mr. Belknap, being engaged, an interview was proposed at the counting house of Mr. James D'Wolf Jun., which took place, and at which Mr. Belknap observed, that the advance was heavy; and a calculation was made by F. G. Bull, the confidential clerk of Mr. James D'Wolf Jun., and by Mr. James D'Wolf himself, of the value of the sugar, compared with the proposed advance; the conclusion of which was, an agreement that the sugars should be shipped, and the authority to draw granted to George D'Wolf; Mr. James D'Wolf engaging, by

letter, to ship the sugars in behalf of George D'Wolf; which form of letter was afterwards carried by George D'Wolf to Mr. Belknap, was assented to by him; was signed by Mr. James D'Wolf Jun.; and the authority to draw granted and used accordingly.

This letter, and the authority to draw, are in the following terms:—

New-York, 15*th November* 1825.

MR. JAMES D'WOLF, JUN.

Dear Sir:—You will please ship for my account, on board of such a vessel as I shall direct, five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brother & Co. Marseilles, and oblige your friend and obedient servant.

GEORGE D'WOLF.

Agreed to, JAMES D'WOLF, JUN.

New-York, 15*th November* 1825.

Messrs. RABAUD, BROTHERS & Co., *Marseilles.*

I have this day authorized George D'Wolf Esq. to draw on you for thousand francs, and I request you to honour his bills to that amount.

Your obedient servant, A. E. BELKNAP.

Mr. George D'Wolf also stated, that his object was to ship the sugars in one of his own vessels; that he was then indebted to the house in Marseilles, about thirty thousand francs, but could not say that Mr. James D'Wolf knew of the debt. The sugars were shipped to obtain the usual advance, and the consignees were to have the usual commissions in the transaction.

Bills, to the amount of the advance were afterwards drawn and negotiated in Boston, and the proceeds of the same applied as follows:—13,000 dollars remitted to Mr. James D'Wolf, in checks on the bank, and in an acceptance of Isaac Clapp, a broker in Boston; and the residue of the proceeds of the transaction passed to the account of George D'Wolf by Mr. Clapp. It was admitted, that the bills were regularly paid at Marseilles, by the defendants in error.

It was also in evidence, by the testimony of Mr. George D'Wolf, that at the time of the negotiation for the bills, Mr. George D'Wolf had in the hands of the plaintiff in error, from three to four hundred boxes of sugar; of which sixty had been remitted from Rhode Island, on account of which he drew the sum of four thousand dollars, and the remainder were purchased for his account by Mr. James D'Wolf Jun.; and at the same time he was indebted to Mr. James D'Wolf Jun. a considerable amount.

Mr. George D'Wolf also testified that the sugars to be shipped were to be on his account, and not on that of the plaintiff in error—that the agreement with Mr. James D'Wolf was that the proceeds of the negotiation of the advance should be remitted to him, and upon this verbal agreement, Mr. James D'Wolf granted his signature to the letter of the 15th of November 1825. Mr. James D'Wolf afterwards wrote to the witness, that he should decline to make the shipment in question, until he should receive the remittances agreed upon. When the letter was first presented, Mr. James D'Wolf declined signing it, deferring it to the next morning, when he should see Mr. Bull; and it was signed the next morning. That the letter or memorandum of agreement, had for its sole object the shipment of the sugars to Marseilles, that market being preferred to New-York; and to place in the hands of Mr. James D'Wolf Jun. the proceeds of the bills, in order to further the shipment; and not with reference to accounts existing between him and the plaintiff in error; and that the plaintiff in error, knew the defendants, and particularly Mr. Belknap, in the transaction as stated.

Mr. George D'Wolf also stated in his evidence, that he did not know that Mr. Belknap was acquainted with the circumstance that the proceeds of the bills were to go to the plaintiff in error; or with the state of accounts between him and Mr. James D'Wolf junior.

Evidence was also given to show, that the plaintiffs below carried on business in Marseilles, in France, and that all of the said parties, with the exception of Mr. Belknap, were native subjects of France; and that Mr. Belknap was a native citizen of the United States, had resided some years in France, and now, always considering Boston as his home, resided in Boston; where he lodged in a boarding-house, in which he hired rooms by the year; and was understood to pay taxes in Boston; his letters of business were addressed to Boston; and he was absent from there in the United States, occasionally, for the purposes of transacting business for the firm in Marseilles.

Soon after the negotiation of the 15th November, Mr. George D'Wolf became insolvent, and at the time of his failure he was largely indebted to the plaintiff in error. Being thus embarrassed he addressed to Mr. Belknap the following letter:—

Bristol, R. I. 27th December, 1825.

M. A. E. Belknap.

Dear Sir,

I am in receipt of yours of the 23d instant, and note its contents. Owing to my embarrassments, the Magnet which I

had wrote you would proceed to New-York to take the sugars, which Mr. James D'Wolf junior was to ship to your house in Marseilles, will not go on. You are therefore at liberty to make any arrangements with him you may think proper, for the interest of all concerned. I am extremely sorry that you met with an accident to prevent your visiting me, as it would have afforded me much pleasure in seeing you.

Believe me very truly your friend,

GEORGE D'WOLF.

Which letter was upon the 27th day of December 1825 shown to the plaintiff in error, by Mr. Belknap; and a copy of the same was, upon the 3d of January 1826, delivered to him enclosed in the following letter:—

New-York, January 3d 1826.

MR. JAMES D'WOLF Junior, New-York,

Sir—I enclose you a copy of a letter which I yesterday received from Mr. George D'Wolf, of Bristol Rhode Island. In pursuance of the authority given me by him, I shall, without delay, engage and provide a vessel, on board of which I shall require you (according to your contract of the 15th November last,) to ship for account of Mr. George D'Wolf five hundred boxes white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co., Marseilles.

Your obedient servant,

A. E. BELKNAP.

On the 4th January 1826, Mr. Belknap addressed the plaintiff in error, in the following terms:—

New-York, January 4th 1826.

MR. JAMES D'WOLF Junior, New-York.

Sir—In pursuance of the notice I gave you in my letter of yesterday, I have engaged the American brig Quito, Captain Wing, now lying at Fly Market wharf, in this city, for the purpose of receiving, on freight, for Marseilles, five hundred boxes of white Havana sugar. The Quito is a good staunch vessel, and is now ready to receive the sugar. I therefore require you to ship on board of her for account of Mr. George D'Wolf, of Bristol R. I. five hundred boxes of white Havana sugar, consigned to Messrs. Rabaud, Brothers & Co. of Marseilles, according to your contract of 15th November last. Herewith, is a copy of a letter I addressed to Mr. George D'Wolf, on the 23d of December last, his answer to which I showed you yesterday; at the same time I gave you a copy of it. If you prefer to ship the sugar in any vessel other than the Quito, I have no objec-

tion, provided you will designate the vessel, and give notice to me immediately, and make the shipment without delay.

Your obedient servant,

A. E. BELKNAP.

To this letter the plaintiff replied as follows:—

New-York, January 5th 1826.

MR. A. E. BELKNAP.

Sir—In answer to your letter of the 4th instant, I have merely to say, that whenever Mr. George D'Wolf, or any person authorized by him, will pay me for five hundred boxes of Havana sugar, I will ship the same, consigned to Messrs. Rabaud, Brothers & Co., at Marseilles.

Your obedient servant,

JAMES D'WOLF JUN.

Evidence was also given, that the brig Quito was engaged early in January 1826 by Mr. Belknap to carry the sugar to Marseilles, that she was a competent vessel for the purpose, and that the freight to be paid for the transportation of the sugar was the usual and customary charge for the same.

The plaintiffs in error objected at the trial to the reading of the letter of 27th December 1825, from George D'Wolf to Mr. Belknap, which objection was overruled by the Court.

On the part of the plaintiffs in error, at the trial of the cause before the Circuit Court, Frederick G. Bull was introduced as a witness, whose testimony is stated in the bill of exceptions to have been given as follows:—

That he is, and for nine years past has been, a confidential clerk in the employment of the said James D'Wolf, junior; that he was present at the counting-room of the said defendant on the 15th day of November 1825, when the interview mentioned and described in the said deposition of the said George D'Wolf took place, between the said George D'Wolf, the said Andrew E. Belknap, and the said James D'Wolf, junior; that the said George D'Wolf and Andrew E. Belknap came into the counting-room on said 15th day of November in company, and were conversing together; that they there found the said James D'Wolf, junior, and the witness; that after some little time had elapsed, the said James D'Wolf, junior, and the witness, withdrew into an inner apartment or adjoining room, and were in a few minutes followed by the said George D'Wolf, and the said Andrew E. Belknap; that while the said Andrew E. Belknap and the said George D'Wolf were in conversation, the latter addressed a question to the said James D'Wolf, junior, and asked him how much five hundred

boxes of sugar would bring, or amount to, at some specified price; that the said James D'Wolf, junior turned to the witness, and asked him to make the calculation; that the witness did make a hasty calculation, and gave for answer, "about seventeen thousand dollars;" that he heard no proposition made by the said James D'Wolf, junior, to the said Andrew E. Belknap, nor by the said Andrew E. Belknap to the said James D'Wolf, junior, nor any conversation between the said Belknap and the said defendant of any importance, although he thinks that the said defendant did speak to the said Belknap once or twice during the said interview; that the said James D'Wolf, junior, appeared, so far as the witness observed, to take little or no interest in the conversation or business which was going forward and taking place between the said George D'Wolf and the said Andrew E. Belknap; that during the time of said conversation and interview, (which occupied not more than ten or fifteen minutes,) the said James D'Wolf, junior, left the counting-room for a short time and returned; that the said James D'Wolf, junior, is in the habit of communicating all matters of business to the witness, and consulting him concerning the same, and the witness does not think it at all probable, that the said James D'Wolf, junior, would have made any contract or agreement with the said Andrew E. Belknap, either at that time or any other, without the knowledge of the witness; that the said James D'Wolf, junior, during part of the time of the said interview, was walking about his counting-room, while the said George D'Wolf and the said Andrew E. Belknap were conversing together, and at one time came up to the witness and addressed some remarks to him; that the witness was writing at the desk, and occupied in his own affairs of business, and did not pay very particular attention to the conversation of the said parties; that the defendant and Belknap might have conversed on the subject of the sugar without the witness knowing it; and the witness would not undertake to say that an agreement by the said defendant with the said plaintiff might not have been made without the knowledge of the witness; that the witness does not know, that the said Andrew E. Belknap knew that the proceeds of said bills were to have been remitted to the said defendant, by the said George D'Wolf, before the said defendant was bound to ship the said sugar; that the said George D'Wolf was, on the 15th day of November 1825, and for a long period anterior thereto, and ever since has been, largely indebted to the said James D'Wolf, junior; that the sum of thirteen thousand dollars, for and on account of the five hundred boxes of sugar mentioned in the said deposition of George D'Wolf, was never paid by the said George to the said defendant, and never came into his hands.

that George D'Wolf did, on or about the 23d day of November 1825, remit to the defendant, his, George D'Wolf's, draft for *six thousand* dollars, on Isaac Clapp, of Boston, at three days' sight, and a check upon the United States' Branch Bank at New-York, for *one thousand dollars; which said draft and check were both paid*, and the amount thereof *received* by the said *James D'Wolf*, junior; that the said George D'Wolf did also, shortly after, transmit to the defendant, his, the said George D'Wolf's draft upon the said Isaac Clapp, at thirty days' sight, for seven thousand dollars, which was received by the defendant, but was never paid, either by the acceptor, the said Isaac Clapp, or the drawer, the said George D'Wolf; but the same was protested for non-payment, and still remains due and unpaid.

The counsel for the defendant below, then offered to prove by Mr. Bull, that there was an express understanding and agreement between the defendant and George D'Wolf, at the time the said letter of the 15th of November was signed by the defendant, that the latter should furnish the defendant with the funds necessary for the purchase of said sugar, before the said defendant would be under any obligation to ship the same.

This testimony was not permitted to go to the jury; the Court stating that "the defendant below could offer no testimony to the jury, of any arrangement between him and George D'Wolf relating to the funds for the payment for the sugar, unless it should also appear that Mr. Belknap was party thereto, or that the same was brought to his knowledge." The counsel for the defendant below excepted to this opinion.

The defendant below also gave in evidence on the trial, the following letter, containing matter contradictory to the testimony of George D'Wolf.

Boston, November 28th, 1825.

Mr. James D'Wolf, Junior.

Dear Sir,

I send you my draft on Mr. Clapp for $6000, at three days' sight, as he cannot get any drafts or checks on New-York, having tried all the banks and brokers; he has not sold the exchange, or any part of it as yet, but thinks he can in three or four days. Last sales 19¼ cents; money very scarce; the New-Yorkers have sent on a great deal of paper; banks stopt discounting. He will remit you the balance as soon as he sells, then, if a draft can be procured; or otherwise will authorize you to draw on him for the balance. I enclose a check on the Branch for $1000, making $7000 which credit this account.

I am your friend and obedient servant,

George D'Wolf.

(D'Wolf ss. Rabaud et al.)

The case was argued by Mr. Ogden and Mr. Jonathan Prescott Hall for the plaintiff in error, and by Mr. Webster and Mr. Charles C. King for the defendants.*

* The following charge was delivered by Mr. Justice THOMPSON to the jury—

This case is of considerable importance in point of amount, and may be considered as a struggle between two innocent parties to throw off from their own shoulders a loss which must fall upon one or the other, by reason of the failure of George D'Wolf. In such cases, it is reasonable to expect that each party will urge with great zeal the points relied on to effect his object.

It has been distinctly stated by the counsel, that situated as this cause is, it is not probable that a decision here will put an end to the controversy, but that it will be carried to the Supreme Court of the United States; and to enable the parties to avail themselves of their rights in this respect, and to take exceptions to the opinion I may express, it may be necessary for me not only to be explicit, but to repeat in some measure what I have already had occasion to say in disposing of the motion for a nonsuit.

The result in the present case will depend principally upon the questions of law which are involved, and with which you have no concern. Some of these questions are, however, so connected with facts which it is your province to decide; and for the purpose of enabling the parties to avail themselves of whatever exceptions they may have to take, many remarks may be made in the course of my charge to you, which, in strictness, are not to be addressed to a jury.

The first question arising is, whether the plaintiffs have shown themselves entitled, under the Constitution and Laws of the United States, to come into this Court to prosecute their action. It has not been denied but that all the plaintiffs except Belknap are aliens, and have a right to bring their suit in this Court. The declaration avers, that Belknap is a citizen of the state of Massachusetts, and it is contended on the part of the defendant, that this averment has not been proved.

From the evidence, it appears, that Belknap was either born in Boston, or removed there with his father, at a very early age, from New-Hampshire, and continued to live in Boston until he went to France, where he remained ten or twelve years, when he returned to Boston. That he is an unmarried man, having no family; lives at lodgings; has rooms, as one of the witnesses understood, hired by the year, and is there about two-thirds of the time. The residue of the time he is absent on business of the firm of which he is a partner, principally in New-York and Philadelphia, and other cities of the United States. One of the witnesses testified, that on one occasion he went with him to town meeting to vote at an election, he did not see him vote, but understood he went there for that purpose. All the witnesses, in answer to the general question, where was the home of Belknap, say it was at Boston; that they should address him at that place as his place of residence if they did not know of his absence. That letters from abroad are addressed to him at that place. These are the leading and principal facts in evidence as to Belknap's being a citizen of Massachusetts. That he is a citizen of the United States cannot be questioned; and if a citizen of any particular state, within the sense and meaning of the Constitution and Law, it must be of Massachusetts. No evidence has been offered to raise a doubt on this point. Whenever absent from Boston it was temporarily, and on the business of the plaintiffs; and to deprive an American citizen of the right

(D'Wolf *vs.* Rabaud et al.)

Mr. Hall and Mr. Ogden for the plaintiff in error.

The defendants in error brought an action of *assumpsit* in the Court below, against the plaintiff in error, founded upon a

of suing in this Court, on the ground of his not being a citizen of any particular state, there ought to be very strong evidence of his being a mere wanderer without a home. Belknap does not appear to stand in this situation. His domicil, his home, and permanent residence, may, with the greatest propriety, be said to be in Boston. There is no pretence that this was merely colourable, for the purpose of qualifying himself to bring this action; and to deprive him of that privilege would be extending this disability beyond the reason and policy of the law. The facts in relation to Belknap do not appear to be in dispute so far as I have understood them; and if, according to your understanding of the evidence, they are as I have stated, the averment that he is a citizen of the state of Massachusetts is sufficiently proved.

2. The next inquiry relates to the merits of the cause, and embraces the main question upon which the rights of the parties must be decided.

The action is founded on a special contract alleged to have been entered into by the defendant, and which he has not complied with. The declaration contains several counts, in which the cause of action is in some respects laid in different ways, but is substantially, that the defendant, in consideration that Belknap would authorize George D'Wolf to draw on the plaintiffs for one hundred thousand francs, undertook and promised to ship for account of George D'Wolf, on board such vessel as he should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs in this cause, accompanied with the necessary averments and allegations of breaches. And the great question is, whether this contract has been proved by such evidence as to make it legally binding on the defendant.

The letter of the 15th of November, 1825, from George D'Wolf to the defendant, requesting him to ship for his account five hundred boxes of white Havana sugar, consigned to the plaintiffs, and underwritten by the defendant "*agreed to*," is the principal evidence in this cause to establish the contract.

It is said, that this letter under the statute of Frauds, does not, on its face, contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection, I think, cannot be sustained. The first question to be settled, and which is matter of fact for your determination, is, whether the arrangement between Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction. The evidence on this point rests principally on the deposition of George D'Wolf. For although Mr. Bull did not hear the defendant assent to the arrangement, yet, from his own statement, such an arrangement or contract might have been entered into by the defendant without his hearing it; it is, therefore, at most, but a negative kind of evidence, and ought not to outweigh the positive testimony of George D'Wolf, unless he is discredited in some way, of which you will judge. His testimony is in writing, and will be submitted to the jury when they withdraw to make up their verdict. They will read and judge for themselves. I understood him to say, that the defendant was with him when they first met in Wall street, and had some conversation about the authority to draw, and the shipment of the sugar, he, George D'Wolf, then

special agreement; they are therefore bound to prove the contract stated in the declaration, expressly, as laid. This is a cardinal rule in pleading. *Anon. L. Ray.* 735. Hockin *vs.* Cooke,

stating to Belknap that he had between three and four hundred boxes of the sugar then in the defendant's possession; that a time was appointed to meet at the defendant's counting-house to negotiate further on the subject; that such meeting did take place, and the agreement then concluded, as contained in the letter of the 15th of November, 1825. The consideration for this undertaking was the authority given by Belknap to George D'Wolf, to draw on the plaintiffs for a hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at the same time with that between Belknap and George D'Wolf, so as to form one entire transaction. This evidence does not in any manner contradict the written agreement, but is perfectly consistent with it. As between the plaintiffs and George D'Wolf, the consideration might clearly be supplied by parol proof; and if the undertaking of the defendant was at the same time, it required no consideration moving from the plaintiffs to him; the consideration to George D'Wolf was sufficient to uphold and support the contract of the defendant. The undertaking of the defendant to make the shipment, was certainly the principal, if not the sole consideration upon which Belknap authorized the drafts on the plaintiffs; for George D'Wolf says expressly, that he does not believe the authority would have been given without such undertaking by the defendant; so that it might be urged with great force that the whole credit was given and rested on the engagement of the defendant to make the shipment. If the contract of the defendant was entered into at the counting-house at the time mentioned, it is of no consequence that the letter was not signed until the day after. This was only reducing to form, and putting into the shape agreed upon, and consummating the arrangement, and would have relation, as between these parties, to the time when the agreement was, in point of fact, entered into.

But if I should be mistaken in this view of the evidence, and the jury should be of opinion that the contract between Belknap and George D'Wolf was completed, and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment, then the evidence is not sufficient to maintain the present action. It would then be a collateral undertaking made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract. Whether it is indispensable that such consideration should be expressed in the written agreement or not, it is unnecessary to decide, because no such consideration has been proved, if it was admissible to supply it by parol evidence.

3. It is said in the next place, that the plaintiffs have failed in establishing a right to recover in this action, by reason of a variance between the allegation in the declaration and the proof in support of it, in relation to the letter of advice from Belknap to his copartners, apprizing them of his having authorized the drafts of George D'Wolf. The declaration alleges, "that in consideration that the plaintiffs would authorize George D'Wolf to draw upon them for one hundred thousand francs, the defendant undertook and promised, &c." But that the written authority shown in evidence was in blank as to the sum to be drawn, and that in this consisted the variance.

This letter being in blank, cannot be set up as a variance between the allegation and the proof. The declaration does not state that the authority

4 *T. R.*, 314. The plaintiffs must, in the first place, prove a *promise* from the defendant to the plaintiffs, and then, any consideration of benefit to the defendant, or of injury to the plaintiffs, moving *between the parties*, will sustain the promise. (1 *Roll. Abr.* 6.)

It is admitted by the learned Judge, in his charge to the jury,

was in writing, or refer in any way to the letter in question; and George D'Wolf swears that he was authorized to draw on the plaintiffs for one hundred thousand francs. That in pursuance of such authority he did draw upon them for that sum, and his bills were accepted and paid. The drafts which accompanied the letter of advice showed the amount, and the bills having been paid, the blank is of no importance in the present action.

4. The next inquiry is, whether any vessel was designated to receive the sugars according to the terms of the agreement. By the contract, the sugars were to be shipped on board such vessel as George D'Wolf should direct. He, having become insolvent, wrote a letter to Belknap, authorizing him to make arrangement with the defendant on this subject, and to designate the vessel; which he accordingly did, and gave notice thereof to the defendant, and demanded the shipment of the sugars. This was amply sufficient. The authority reserved to George D'Wolf, to direct in what vessel the shipment should be made, was for his benefit, which he might waive. He was not bound personally to designate such vessel; he might do this by his agent, and the authority given to Belknap was constituting him such agent for that purpose; and the act of Belknap in this respect, was, in judgment of law, the act of George D'Wolf; and it is in proof, that the vessel designated was in every respect fitted for the purpose. Nor was any objection made by the defendant at the time on this ground; but he declined making the shipment, because George D'Wolf had not furnished him with funds to purchase the sugars; and the objection that the vessel was not designated by George D'Wolf cannot now be set up. The act of his agent was his act, and the evidence, therefore, fully supports the contract as laid in the declaration.

5. The only remaining question is as to the rule by which the damages are to be ascertained. Upon this subject much of the evidence which has been introduced on the part of the plaintiffs, and the various estimates and calculations which have been submitted to the jury, may be entirely laid aside, according to the view which I have taken of the question. I concur with the defendant's counsel on this point, that the measure of damages must be the value of the sugars in New-York, at the time of the breach of the contract by the defendant, in refusing to make the shipment according to his contract. If this was a question between George D'Wolf and the plaintiffs, for settling the account of the proceeds of the sugars, had they been shipped, it might have required the application of different principles. But the breach of the contract on the part of the defendant, consists in not making the shipment and consignment according to his undertaking. He did not undertake to deliver the sugars to the plaintiffs at Marseilles. He had no concern with the transportation or the expenses incident thereto. If he had shipped the sugars on board the vessel designated, consigned to the plaintiffs, his contract would have been complied with. The plaintiffs are accordingly entitled to recover the value of the sugars in New-York, at the time when the defendant was bound by his contract to make the shipment. This amount the jury will ascertain from the evidence that has been offered them on that subject.

that "the letter" from Geo. D'Wolf to the defendant, dated November 15th, 1825, and upon which the latter subscribed the words "agreed to," is the *principal* evidence in the cause. This letter, we say, neither proves, nor *conduces* to prove the promise laid in the declaration. In the first place, the plaintiffs are not *parties* to the contract contained in the writing; and it is a general rule, that no person can maintain an action of *assumpsit*, upon an agreement to which he is not *a party*; for in such case there can be no contract express or implied. Jordan *vs.* Jordan, *Cro. Eliz.* 369. Crow *vs.* Rogers, 1 *Strange*, 592. Bourne *vs.* Mason, 1 *Vent.* 6.

The construction to be put upon this letter is matter of law, and it ought not to pass to the jury without explanation from the Court. (1 *T. R.* 172.) This agreement, *upon its face*, clearly purports to be a contract between George D'Wolf upon the one part, and James D'Wolf jun. upon the other. The words of the letter are to be explained according to their *natural import*; and we are not to go in search of *conjectures*, in order to extend them, when the meaning conveyed by the terms of the agreement is evident, and leads to no absurd conclusion. *Chitty on Com. & Mar.* vol. 3, 107. *Powel on Con.* title "Interpretation." *Vattel's L. of N.* 224.

An express contract is gathered merely from the words of the parties themselves, who are bound to know the meaning which the law will attach to express words. It rests on no uncertain inferences of the *probable* meaning of the parties; but on the *actual declaration* of intention, made in direct terms. *Chitty on Com. & Mar.* vol. 3, pages 3 and 4.

"The letter" judged by these rules, is plainly a contract between the defendant and Geo. D'Wolf, resting upon a consideration passing between *them*, and the insertion of the names of the plaintiffs was a mere direction, as to whose *care* the sugar when shipped should be committed. The plaintiffs are the mere agents or intended bailees of Geo. D'Wolf, and have no apparent interest in the subject matter of the contract. The agreement is placed, by the terms made use of, entirely under the control of Geo. D'Wolf, who has the power of designating a vessel to receive the sugar. He is a party in fact, and a party in interest, and by complying with the terms of the agreement imposed upon *him*, he would have the right, and the *sole* right to seek an enforcement of the contract. The words "for my account," contained in the letter prove that the agreement was not made *with* nor *for* the plaintiffs, and they have no authority for bringing an action in their own names, for a violation of the contract.

This position may be supported by an analogy drawn from bills of lading. A bill of lading, expressed in the ordinary

form, transfers the property absolutely to the *consignee*, and he becomes, in legal contemplation, the *owner* of the goods. But if words are made use of in the bill of lading, which show that the property of the shipment remains in the consignor, and that the consignee is the mere *agent* or *factor* of the consignor; then no action for a violation of the *contract* contained in the bill of lading, will lie in the name of the *consignee*. It must be brought in the name of the consignor. If the rights of the consignee, arising from advances made in *expectation* of the consignment are violated, he has no remedy upon the *contract*, but must bring trover, or go into a Court of Equity. Evans *vs.* Martlett, 12 *Mod.* 156. *Chitty on Com. & Mar.* vol. 3. 401. n. 2. n. 5. Potter *vs.* Lansing, 1 *John.* 215. Davis *vs.* Jordan, 5 *Burrows*, 2680. Sargeant *vs.* Morris, 3 *B. & A.* 277.

The action must be brought in the name of the party who has the legal interest in the subject matter of the contract; and a mere equitable right, if any exist, will not support an action upon an *express agreement* to which the plaintiffs are not parties. If this sugar had been shipped, it would have been shipped as the property of Geo. D'Wolf, who would have been liable for freight, insurance, and commissions. The property would have been at his risk; and in case of the bankruptcy of the plaintiffs, Geo. D'Wolf would have had the right to repay to them the advance received, and to stop the goods *in transitu*.

"This not being an action for deceit and imposition, but on a *written contract*, the right of the plaintiffs to recover is measured precisely by that contract." Tayloe *vs.* Riggs, 1 *Peters's Reports of the Decisions of the S. C.* 1828, *post.*

2. The letter upon its face, is plainly a contract between the defendant and Geo. D'Wolf. It is not negotiable, and the delivery of it, therefore, to the plaintiffs by Geo. D'Wolf, gives them no authority to maintain an action upon the agreement in their *own names*. This instrument bears no analogy to a bill of exchange: not being made payable in *money* and containing no operative words of transfer. It is a mere executory agreement to ship merchandise, and if valid would only subject the defendant to *damages* for its violation, as between the *original parties*. (Smith *vs.* Smith, 2 *John.* 240. Jerome *vs.* Whitney, 7 *John.* 321. Cooledge *vs.* Ruggles, 15 *Mass.*) If this letter or order had been for the payment of money, but drawn in its present restricted form, it would not have entitled the plaintiffs to maintain an action in their own names upon the *acceptance* or *special contract*. No instrument in the form of a bill of exchange, was ever held to be negotiable, unless in some substantial form made payable *to order* on the face of it. The law, as laid down in the case of Hill *vs.* Lewis, (1 *Salk.* 133,) has always been adhered to. (See Girard *vs.* Da Costa et al. 1 *Dallas*, 144. Down-

ing *vs.* Backentoes, 3 *Caines*, 137. Stephens *vs.* Hill, 5 *Esp. N. P. Cases*, 247.)

3. This letter being a contract between Geo. D'Wolf and the defendant, is, as between the original parties, *nudum pactum*, for the want of mutuality and void. George D'Wolf was not bound to designate a vessel nor to receive the sugar; and it is a universal rule that a contract cannot bind one party and not the other. "A *promise* may be voluntary, but an *agreement* to be binding, must contain a *mutual* engagement." Lyon *vs.* Lamb, *Fell. on Mer. Guar.* 336. 1 *Roll. Ab.* 23. *Coke Litt.* 55, *a.* Doe *vs.* Smith, 2 *T. R.* 438. Clayton *vs.* Jennings, 2 *W. B. R.* 706. Payne *vs.* Cane, 3 *T. R.* 148. Cooke *vs.* Oxley, 3 *T. R.* 148. Waine *vs.* Warlters, 5 *East*, 16. Kington *vs.* Phelps, *Peake's N. P. Cas.* 227. Tucker *vs.* Woods, 12 *John.* 190. Parkhurst *vs.* Van Cortlandt, 1 *John. C. R.* 282. Jenkins *vs.* Reynolds, 3 *Brod. & B.* 13. Woods *vs.* Edwards, 19 *John.* 211. McLemore *vs.* Powell, 12 *Wheat.* 557. 2 *Black. Com.* 447. 1 *Fonb. Eq.* 383, *n. a. vol.* 3, 129. 4 *T. R.* 764–5. 7 *Ibid.* 129–131. 7 *Bro. P. C.* 184.

4. But if the agreement be not void for want of mutuality; still payment of the value of the sugar to the defendant, is a condition precedent to his undertaking to ship, clearly implied from the face of the instrument, and should have been averred in the declaration. *Chit. Plea.* 314–15. 1 *Wm. Saund.* 320 *note* 4 *at the end. Com. Dig. title Pleader C.* 51. 1 *T. R.* 645. 7 *Ibid.* 121. 1 *Saund.* 319–320. 1 *East*, 203, 208, 619. Cowper *vs.* Andrews, *Hobart*, 41. 1 *H. Black.* 363.

5. The contract of the defendant relative to the shipment of the sugar was entirely in writing, and is contained in the letter of November 15th 1825. If this agreement is free from ambiguity, so as to be capable of a sensible exposition from its own terms, without reference to extrinsic matters, *dehors* the instrument itself; then no parol evidence can be introduced to vary the terms of the agreement, or to change the parties thereto. Clarke *vs.* Russell, 3 *Dall.* 421. Gunnis *vs.* Erhart, 1 *H. Black.* 289. Coker *vs.* Guy, 2 *Bos. & Pull.* 565. Thompson *vs.* Ketchum, 8 *John.* 146. Gilpins *vs.* Consequa, 1 *Pet. R.* 87. Dean *vs.* Mason, 4 *Con. R.* The N. Y. Ins. Co. *vs.* Thomas, 3 *John. Cas.* 1. Jackson *vs.* Croy, 12 *John.* 427. 11 *Mass.* 27. 2 *Brow. Ch.* 219. *Peake's Ev.* 117. Vandevoort *vs.* Col. Ins. Co. 2 *Caines*, 155. Mumford *vs.* McPherson, 1 *John. Rep.* 418. Brigham *vs.* Rogers, 17 *Mass.* Powell *vs.* Edmunds, 12 *East*, 10. Jackson *vs.* Sill, 11 *John.* 216. Parkhurst *vs.* Van Cortlandt, 1 *J. C. R.* 283. Hampshire *vs.* Pierce, 2 *Vez.* 216. Jackson *vs.* Hart, 12 *John.* 17. Grant *vs.* Naylor, 4 *Cranch*, 224.

6. But if there is any doubt upon this subject, and the parol evidence be admitted to explain the agreement, then we say, that neither the parol proof, nor "the letter" taken in *connexion*

with the parol proof, can sustain the plaintiffs' declaration.—1. Because there is no proof upon the record, that the defendant ever made the promise set forth in the declaration, either *to* or *for* the plaintiffs: but on the contrary, the evidence is conclusive that the *very promise*, claimed by the plaintiffs to have been made to them and for their benefit, was made by the defendant to George D'Wolf, and for his benefit. The defendant having moved for a nonsuit at the trial, has a right to examine the testimony upon this point at this time, in the same manner as upon the original motion. If the testimony offered in evidence by the plaintiff, be insufficient, in point of law, to sustain his declaration, the defendant has a right to call upon the Court to nonsuit the plaintiff. Swift *vs.* Livingston, 2 *John. Cases*, 112. Clements *vs.* Benjamin, 12 *John.* 298. Pratt *vs.* Hull, 13 *John.* 298. Crookshank *vs.* Gray, 20 *John.* 350.

2. The consideration upon which the defendant's promise was made, is entirely different from that set forth in the declaration, and this is a fatal *variance*. (King *vs.* Robinson, *Cro. Eliz.* 79. *Com. Dig. vol.* 1, 334, *title, action upon the case upon assumpsit.)*

3. Were there any doubt upon these points, the defendant ought to have been permitted to remove them by the testimony of Mr. Bull. If it be contended that this promise, although not made *directly* to the plaintiffs, was nevertheless made to Geo. D'Wolf for their *benefit;* then the testimony offered by the defendant at the trial, ought to have been received to contradict this assertion.

4. But the promise contained in the letter, if made *to* Geo. D'Wolf for the *benefit* of the plaintiffs, will not sustain the declaration, unless he can be considered as the mere *agent* of the plaintiffs; and this supposition is contradicted, not only by the words of the instrument itself, but by the plaintiffs' own witness. [The counsel here referred to and commented on the following cases: Dutton *vs.* Pool, 2 *Lev.* 210. Schermerhorn *vs.* Vanderheyden, 1 *John. Rep. p.* 9. Felton *vs.* Dickenson, 10 *Mass.* 287. Piggott *vs.* Thompson, 3 *Bos. & Pull.* 149, *and the note.* Martyn *vs.* Hynde, *Cowp.* 437. Com. of Feltmakers *vs.* Davis, (1 *Bos. & Pull.* 102.) 3 *Salk.* 234. *Comb.* 450. 3 *T. R.* 757. *Chitt. on Plea. vol.* 1, *p.* 4. *Com. Diges. vol.* 1, *p.* 309 *and the note p., title action upon the case upon assumpsit.*] Indeed in the case of a written contract "*inter partes*," no other than an immediate party to the instrument itself, can maintain an action upon it. (Offley *vs.* Warde, 1 *Lev.* 235. Gilbey *vs.* Copley, 3 *Lev.* 139. Salter *vs.* Kingsley, *Carth.* 77.)

If Geo. D'Wolf was the *agent* of the plaintiffs, then they are bound by his acts, and must place the proceeds of the bills of exchange in the hands of the defendant, according to George

D'Wolf's express promise, before he will be under any obligation to ship the sugar.

7. No vessel has ever been designated by George D'Wolf, on board of which the defendant has been required, by George D' Wolf, to ship the sugar; and until such designation, no right of action will accrue in favour of any person against the defendant. The letter of George D'Wolf dated December 27th, 1825, and addressed to A. E. Belknap, (relied upon by the counsel for the plaintiffs to prove an authority in Belknap to designate a vessel as the agent of George D'Wolf,) is insufficient for that purpose. It gives Belknap no such authority; and besides, George D'Wolf had no right, legal or moral, after his bankruptcy, and after failing to place funds in the hands of the defendants, either for the purchase or payment of the sugar,—to call upon him to ship the same, consigned to the plaintiffs at Marseilles.

8. The agreement of the defendant relative to the shipment of the sugar, if made with the plaintiffs at all, was collateral to an undertaking on the part of George D'Wolf that he would cause the sugar to be shipped by the defendant, in consideration of an authority to be given to him to draw bills of exchange upon the plaintiffs, for his own benefit. For the non-fulfilment of this promise, George D'Wolf was and is liable, and the defendant's undertaking is essentially a guarantee, given in aid of George D'Wolf's credit, or for the performance of an act which he was bound by a promise, confessedly original, to perform. From the performance of this promise George D'Wolf has never been exonerated, and the defendant's undertaking is collateral to that of George D'Wolf.* The testimony of the plaintiffs is therefore inadmissible under the statute of frauds, to prove their declaration for the want of a sufficient memorandum of the *agreement* in writing. Whatever doubts may have existed upon this subject, it is now well settled, that in cases under the statute of 29 *Char.* 2, *chap.* 3, *sec.* 4 (1 *N. Y. Revised Laws page* 78, *chap.* 44, *sec.* 11) the *consideration* upon which the agreement rests as well as the *promise itself*, must appear upon the writing. Wain *vs.* Warlters, 5 *East*, 16. Lyon *vs.* Lamb, *Fell. on Guar.* Saunders *vs.* Wakefield, 3 *B. & Ald.* 595. Jenkins *vs.* Reynold, *B. & Bing. p.* 14. Jean *vs.* Brink, 3 *John.* 211. Leonard *vs.* Vredenburg, 8 *John.* 27. Stewart *vs.* M'Givin, 1 *Cow.* 99. Sloan *vs* Wilson, 4 *Har. & John.* 322. Stephens, Ramsay & Co. *vs.* Winn, 2 *Nott & M'Cord* 372.

* Buckmyr *vs.* Darnall, 2 *L. Ray.* 1085. Anderson *vs.* Hayman, 1 *H. B.* 120. Gordon *vs.* Martyn, *Fitz.* 302. Matson *vs.* Wharham, 2 *T. R.* 80. Jones *vs.* Ballard, Chase *vs.* Day, 17. *John.* 114. *Buller's N. P.* 280. *c.* 281. Jackson *vs.* Raynor, 12 *John.* 291.

(D'Wolf vs. Rabaud et al.)

Mr. Webster and Mr. King for the defendants.

1. As this cause is brought here by a writ of error, we apprehend that the Court will not go into an examination of the weight of the testimony. The verdict of the jury is conclusive, that the defendant made the agreement stated in the plaintiffs' declaration.

It is unnecessary now to inquire, what was the agreement between the defendant and George D'Wolf, or whether that agreement could be enforced—and it was equally so at the trial unless that agreement was brought home to the knowledge of Belknap, so as to become a part of the defendant's contract with the plaintiffs.

2. But aside from the verdict—The testimony proved the contract as laid in the declaration. If we put the case upon the verbal agreement between the parties, as we contend that we may, (3 *Dall.* 300) then the testimony of George D'Wolf clearly made out our case. The letter is only corroborative of the verbal agreement. If we go upon the written contract as contained in the letter of the 15th November 1825; then we contend, that the written agreement is in its terms as much an agreement with the plaintiffs as with George D'Wolf, and may enure to their benefit. If the letter had not expressed that the sugars were to be shipped for the account of George D'Wolf, the agreement of the defendant would have been a mere undertaking with the plaintiffs.

But, for the purpose of this action, it is sufficient, that the agreement contained in the letter of the 15th November, was in fact made and entered into by the defendant for the use and benefit of the plaintiffs. That it was so, was fully proved. They advanced the consideration of the undertaking in the faith of its being performed; and the defendant, at the time when he signed the letter, knew, that it was to be delivered to Mr. Belknap, who on its credit would authorize George D'Wolf to draw the bills.

It was not necessary, in order to entitle the plaintiffs to maintain their action, that George D'Wolf should have been a mere agent without interest. The cases cited do not support the position of the counsel. The rule is, that if the promise is made to A for the benefit of B, from whom that consideration moves, the law will intend that A is the mere agent of B. (1 *Com. Dig.* action on the case *assumpsit. E & note*, Weston *vs.* Barker, 12 *John. Rep.* 276. Lawson *vs.* Mason, 3 *Cranch*, 492.)

3. The main question, and that which involves the merits of this cause, arises upon that part of the charge of the learned Judge, in which he instructed the jury "that if the undertaking of the defendant was entered into at the same time with that between Belknap and George D'Wolf, so as to form one entire

transaction, then the consideration of the defendant's undertaking might be proved by parol."

It is conceded that if the undertaking of the defendant was original, and not within the statute of Frauds, parol evidence of the consideration was admissible. If the consideration be stated in connexion with the written agreement, the undertaking is in its terms direct to the plaintiffs; and nothing more remains to be supplied by parol evidence. But, if it were necessary, parol evidence was admissible to prove the *res gesta*, and purpose of that letter and agreement. Bateman *vs.* Phillips, 15 *East*, 272. 7 *Taunt.* 295. 5 *Wheat.* 326.

But it is contended, that the undertaking of the defendant, (if an undertaking to the plaintiffs,) was a collateral agreement within the statute of Frauds; and that the consideration as well as the promise, must be in writing, in order to be binding upon the defendant.

Admitting the law to be now settled by the English cases, as we say it ought not to be, we contend, that if the general proposition which was first laid down by Lord Ellenborough in the case of Wain *vs.* Warlters, can be maintained, still our case cannot in any view of it be brought within the principle of that case.

In Wain *vs.* Warlters, the defendant undertook to pay the *previously subsisting* debt of another person, upon a *new* consideration; that the plaintiff would forbear to sue. In the present case, the jury have expressly found that the arrangement between Mr. Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of the sugar, and the undertaking of the defendant to make that shipment, were made and entered into at one and the same time, so as to form one entire transaction; and that the authority given by Mr. Belknap to George D'Wolf to draw on the plaintiffs for 100,000 francs, was the consideration of the entire agreement. If then the undertaking of the defendant was collateral and within the statute of Frauds, it was simultaneous with the original undertaking, and supported by the same consideration—and upon the authority of Leonard *vs.* Vredenburgh, (8 *Johns. Rep.* 29,) the parol evidence of the consideration was admissible. Leonard *vs.* Vredenburgh was decided upon deliberate consideration, and has been followed and confirmed in the subsequent cases, (Bailey *vs.* Freeman, 11 *Johns. Rep.* 221. Nelson *vs.* Dubois, 13 *Johns. Rep.* 175,) and it is regarded as settled law in the state of New-York.

4. The undertaking of the defendant was not collateral in any sense; but was an original undertaking, exclusively his, and need not have been in writing.

By agreeing to ship the sugars and to consign them to the

plaintiffs, on the account of Geo. D'Wolf, the defendant did not undertake to pay any debt of George D'Wolf, then existing, or about to be created. The defendant was the only person who undertook or was bound to make the shipment. He did not engage that Geo. D'Wolf should ship the sugars, or that he would ship on the default of George; but he assumed the entire and exclusive responsibility of providing and shipping the five hundred boxes, according to the terms of the letter.

5. The letter from George D'Wolf to Mr. Belknap, dated at Bristol on the 27th December, 1828, constituted Mr. Belknap the agent of George D'Wolf for the purpose of naming the vessel, on board of which the defendant was to make the shipment. It was intended as an authorization for that purpose, and was regarded as such both by Mr. Belknap and the defendant. But whatever objections might have been made by the defendant, either to the sufficiency of that authority, or to the right of George D'Wolf, after his bankruptcy, either to name the vessel, or to authorize Mr. Belknap, or any other person to do so, they were waived by the defendant in his letter to Mr. Belknap, under the date of the 6th of January, 1826, wherein he puts his refusal to ship the sugars on the single ground, that they had not been paid for.

Mr. Justice STORY, delivered the opinion of the Court.—

Messrs. Rabaud, Brothers & Co., of Marseilles, brought a suit in the Circuit Court of the southern district of New-York, against James D'Wolf jun. (the plaintiff in error,) to recover damages, for not shipping them 500 boxes of sugar on account of one George D'Wolf, according to an agreement entered into by him with them. The declaration contained four counts, and in each of them the substance of the contract stated, is that the defendant, in consideration that one Belknap (one of the partners in the house of Rabaud, Brothers & Co.,) would authorize George D'Wolf to draw on the plaintiffs for 100,000 francs, undertook and promised, that he would ship for the account of George D'Wolf, on board such vessel as he, George D'Wolf should direct, five hundred boxes of white Havana sugar, consigned to the plaintiffs at Marseilles. The declaration then proceeds with the proper averments, and breaches, necessary to maintain the action: upon the trial, under the general issue, the jury found a verdict for the plaintiffs, and judgment was given for them accordingly. The cause now comes before this Court upon a writ of error, and bill of exceptions, taken at the trial.

The bill of exceptions is voluminous, and contains, at large, the evidence admitted at the trial, as well as the charge of the

learned Judge who presided at the trial. It is unnecessary to refer to that evidence, or to consider its nature bearing and extent, upon which so ample a comment has been made at the bar, except so far as it applies to some question of law decided by the Court, to which an exception has been taken. The whole facts were left open to the jury, and so far as they were imperfect, or inconclusive, the defendant has had the full opportunity of addressing his views to the jury, and they have found their verdict against him.

In the progress of the trial, a letter of the 27th December 1825, written by George D'Wolf to Belknap, was offered by the defendants in evidence, for the purpose of showing an authority from George D'Wolf to Belknap, to direct or name a vessel to the defendant, on board of which the sugars might be shipped. The defendant objected to its admission, and the objection was overruled. This constitutes the first ground of error, now insisted on by the defendant. We are of opinion that the letter was rightly admitted, for both of the reasons stated in the charge. It was evidence of such an authority; and the defendant made no objection to it at the time, on account of any insufficiency in this respect; but put his defence by his letter of the 5th of January 1826, on an entirely distinct ground.

After the evidence for the plaintiffs was closed, the defendant moved for a nonsuit, which motion was overruled. This refusal certainly constitutes no ground for reversal in this Court. A nonsuit, may not be ordered by the Court, upon the application of the defendant, and cannot as we have had occasion to decide, at the present term, be ordered in any case without the consent and acquiescence of the plaintiff, Elmore *vs.* Grymes, *ante*, page 469. In the further progress of the trial, upon the examination of one Frederick G. Bull, a witness for the defendant, the counsel for the defendant offered to prove, by Bull, that it was an express understanding and agreement between the defendant and George D'Wolf, at the time the letter of the 15th November 1825 (which will be hereafter more particularly noticed,) was signed by the defendant; that the latter should furnish the defendant with the funds necessary for the purchase of the sugar, before the defendant would be under any obligation to ship the same. This testimony was rejected by the Court, unless it should also appear that Belknap was a party thereto, or that the same was brought home to his knowledge. We can perceive no error in this decision. If the defendant had entered into the contract with the plaintiffs, stated in the declaration, and the private arrangement made between the defendant and George D'Wolf, constituted no part of that contract, and was unknown to them, it certainly ought not to prejudice their rights. It was *res inter alios acta;* and had no le-

gal tendency either to disprove the plaintiffs' case, or to exonerate the defendant from his liability.

The other exceptions are exclusively confined to the charge given to the jury, upon the summing of the Court, upon points of law.

The first objection was to the sufficiency of the evidence to establish the citizenship of Belknap, as averred in the declaration. This is now waived by the counsel, and indeed could not now be maintained, because it has been recently decided, by this Court, upon full consideration, that the question of such citizenship constitutes no part of the issue upon the merits, and must be brought forward by a proper plea in abatement, in an earlier stage of the cause.

The great question upon the merits, arises upon that part of the charge, which relates to the agreement contained in the letter of the 15th of November 1825, from George D'Wolf to the defendant, and the accompanying assent of the latter, with reference to the statute of Frauds.

That letter is in the following terms.—

New-York, 15th November 1825.

Mr. James D'Wolf, Jun.

Dear Sir:—You will please ship for my account on board such vessel as I shall direct, five hundred boxes white Havana sugar consigned to Messrs. Rabaud, Brothers & Co. Marseilles, and oblige your friend and obedient servant,

(Signed) George D'Wolf.

Agreed to, (Signed) James D'Wolf, Jun.

Upon this part of the case, the charge was as follows:—"It is said that this letter, under the statute of Frauds, does not purport on its face to contain any binding contract on the part of the defendant, and that the defects cannot be supplied by parol evidence. This objection I think cannot be sustained. The first question to be settled, and which is matter of fact for your determination is, whether the arrangement between Belknap and George D'Wolf, as to the authority to draw on the house in Marseilles, on the shipment and consignment of five hundred boxes of sugar, and the undertaking of the defendant, were made and entered into at one and the same time, so as to form one entire transaction." The Judge then proceeded to sum up the evidence on this point and added—"The consideration for this undertaking was the authority given by Belknap to George D'Wolf, to draw on the plaintiffs for one hundred thousand francs. This consideration, it is true, although fully proved, is not expressed in the written contract. And one question is, whether it can be supplied by parol evidence; and I think it may, if the undertaking of the defendant was entered into at

the same time, with that between Belknap and George D'Wolf, so as to form one entire transaction. The evidence does not, in any manner, contradict the written agreement; and is perfectly consistent with it; as between the plaintiffs and George D'Wolf the consideration might be clearly supplied by parol proof; and if the undertaking of the defendant was at the same time, it required no consideration from the plaintiffs to him, the consideration to George D'Wolf was sufficient to uphold and support the contract of the defendant." And he finally stated if he was mistaken in this view of the evidence "and the jury should be of opinion, that the contract between Belknap and George D'Wolf, was completed, and unconnected with the engagement of the defendant, before he undertook to make the shipment and consignment; then the evidence was not sufficient to maintain the present action. It will then be a collateral undertaking, made subsequent to the principal contract, and would require some other consideration than that which supported the principal contract."

The question then, so far as it was a question of fact, whether the defendant did enter into the asserted agreement with the plaintiffs and whether it was a part of the original arrangement, with George D'Wolf, and upon the original consideration moving from the plaintiffs, was before the jury, and they have found in the affirmative. The question of law remains, whether this was a case within the statute of Frauds, so as to prevent parol evidence from being admissible, to charge the defendant.

The statute of Frauds of New-York, is a transcript, on this subject, of the statute of 29th of Charles 2, ch. 3. It declares "that no action shall be brought to charge a defendant on a special promise for the debt, default or miscarriage of another, unless the agreement, or some memorandum or note thereof be in writing and signed by the party, or by any one by him authorized." The terms "collateral" or "original" promise, do not occur in the statute, and have been introduced by Courts of law to explain its objects and expound its true interpretation. Whether by the true intent of the statute, it was to extend to cases where the collateral promise, (so called,) was a part of the original agreement, and founded on the same consideration moving at the same time between the parties; or, whether it was confined to cases, where there was already a subsisting debt and demand, and the promise was merely founded upon a subsequent and distinct undertaking; might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination; at least in those states where the English authorities have been fully

recognised and adopted in practice. If A agree to advance B a sum of money, for which B is to be answerable, but at the same time it is expressed upon the undertaking, that C will do some act for the security of A, and enter into an agreement with A for that purpose; it would scarcely seem a case of a mere collateral undertaking; but rather, if one might use the phrase, a trilateral contract. The contract of B to repay the money, is not coincident with, nor the same contract with C to do the act. Each is an original promise, though the one may be deemed subsidiary, or secondary to the other. The original consideration flows from A, not solely upon the promise of B or C, but upon the promise of both, *diverso intuita*, and each becomes liable to A, not upon a joint but a several original undertaking. Each is a direct, original promise, founded upon the same consideration. The credit is not given solely to either, but to both; not as joint contractors, on the same contract, but as separate contractors upon co-existing contracts, forming parts of the same general transaction. Of that very nature is the contract now before the Court; and if the intention of all the parties was, that the letter of the 15th of November should be delivered to Belknap, as evidence of the original agreement between all the parties, and indeed as part execution of it, to bind the defendant not merely to George D'Wolf, but to the plaintiffs; (and so it has been established by the verdict;) then it is not very easy to distinguish the case from that which was put.

But assuming that the true construction of the statute of Frauds is, as the authorities seem to support, and that such a promise would be within its purview; it remains to consider whether the arguments at the bar do establish any error in the opinion of the Circuit Court.

In the first place, there is no repugnance between the terms of that letter and the parol evidence introduced. The object of the latter was to establish the fact, that there was a sufficient consideration for the agreement; and what that consideration was, and also the circumstances under which it was written, as explanatory of its nature and objects. Its terms do not necessarily import, that it was an agreement exclusively between George D'Wolf and the defendant. If the paper was so drawn up and executed, by the assent of all the parties, for the purpose of being delivered to Belknap, as a voucher, and evidence to him of an absolute agreement by the defendant to make the shipment, and so was in fact understood by all the parties at the time; there is nothing in its terms inconsistent with such an interpretation. The defendant agrees to the shipment. But with whom? It is said with George D'Wolf alone; but that does not necessarily follow, because it is not an instrument in its terms *inter partes*. If the parties intended that it should express the joint assent

of George D'Wolf and the defendant, to the shipment, and it was deliverable to Belknap accordingly, as evidence of their joint assent that it should be made upon the terms and in the manner stated in it, there is nothing which contradicts its proper purport; and it is then, precisely, what the parties require it to be. It was for the jury to say, whether the evidence disclosed that as the true object of it; and to give it effect accordingly, as proof of an agreement in support of the declaration. The case of Sargent *vs.* Morris, (3 *Barn. & Ald.* 277) furnishes no uninstructive analogy for its admission.

In the next place, was the parol evidence inadmissible to supply the defect of the written instrument, as to the consideration, and *res gestæ*, between the parties. The case of Wain *vs.* Warlters, (5 *East*, 10,) was the first case which settled the point, that it was necessary to escape from the statute of Frauds, that the agreement should contain the consideration for the promise, as well as the promise itself. If it contained it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. That case has from its origin encountered many difficulties, and been matter of serious observation both at the bar, and on the bench, in England and America. After many doubts, it seems at last in England, by the recent decisions of Saunders *vs.* Wakefield, (4 *Barn. & Ald.* 595) and Jenkins *vs.* Reynolds, (3 *Brod. & Bing.* 14,) to have settled down into an approved authority. It has however assumed a uniform recognition in America; although in several of the states, and particularly in New-York, it has to a limited extent been adopted into its jurisprudence, as a sound construction of the statute. On the other hand, there is a very elaborate opinion of the Supreme Court of Massachusetts, in Packard *vs.* Richardson (17 *Mass.* 122,) where its authority was directly overruled. What might be our own view of the question, unaffected by any local decision, it is unnecessary to suggest; because the decisions in New-York, upon the construction of its own statute, and the extent of the rules deduced from it, furnish, in the present, a clear guide for this Court. In the case of Leonard *vs.* Vredenburgh, (8 *John. R.* 29.) Mr. Chief Justice Kent, in delivering the opinion of the Court, adverting to the fact that that case was one of a guarantee, or promise collateral to the principal contract, but made at the same time, and becoming an essential ground of the credit given to the principal or direct debtor; added, "and if there was no consideration other than the original transaction, the plaintiff ought to have been permitted to show that fact, if necessary by parol proof; and the decision in Wain *vs.* Warlters, did not stand in the way."

One of the points in that case was, whether the parol proof

of the consideration was not improperly rejected at the trial; and the decision of the Court was, that it ought to have been admitted. It is not therefore, as was suggested at the argument, a mere *obiter dictum*, uncalled for by the case. It was one, though not the only one of the points in judgment before the Court. The same doctrine has been subsequently recognised by the same Court in Bailey *vs.* Freeman, (11 *Johns. R.* 221,) and in Nelson *vs.* Dubois, (13 *Johns. R.* 175.)

It does not seem necessary to pursue this subject farther, because here is a clear authority justifying the admission of the parol evidence, upon the principal of the local jurisprudence. It seems to us a reasonable doctrine, founded in good sense and convenience, and tending rather to suppress than encourage fraud. But whether so, or not, it sustains the opinion of the Circuit Court, in a manner entirely free from exception.

The next objection to the charge, founded on the variance between the declaration and proofs, has been abandoned at the argument, and need not be dwelt upon. And the last objection, to wit., to the designation of a vessel for the shipment as ineffectually made, has been already in part answered; and we entirely coincide with the views expressed on this point, by the Circuit Court.

Without therefore going more at large into the points of the case, or commenting upon the various authorities and principles so elaborately brought out in the discussions at the bar, it is sufficient to say, that we perceive no error in the judgment of the Circuit Court, and it is therefore to be affirmed with costs.

JOHN DAVIS AND OTHERS, PLAINTIFFS IN ERROR, *vs.* RICHARD B. MASON, LESSEE.

In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky, is the law of this Court, in deciding the rights of the parties. {505}

It *seems*, that the rigid rules of the common law do not require that the husband shall have had actual seisin of the lands of the wife, to entitle himself to a tenancy by courtesy, in waste, or what is sometimes styled "wild lands." {506}

If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists. {508}

At present it is fully settled in equity, that the husband shall have courtesy of trust as well as of legal estates, of an equity of redemption, of a contingent use, or money to be laid out in lands. {508}

Under the law of the state of Kentucky, and the decisions of their Courts upon it, a will with two witnesses, is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. {508}

It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it. {509}

THE lessee of Richard B. Mason commenced an action of ejectment in the Circuit Court for the district of Kentucky, against John Davis and others tenants in possession, for the recovery of eight thousand acres of land, claiming to recover the same under a right of entry under, and by virtue of a grant from the state of Virginia to George Mason of Fairfax, dated 19th of March 1817.

William Mason and others conveyed, by deed, their interest in and to the land in contest, (they being children of the patentee,) to George Mason of Lexington, the eldest son of George Mason the patentee. George Mason, the grantee and the father of the lessor died the day of December 1796, having first made his last will and testament; in a codicil to which, made on the 3d of November 1796, he devised to the child of which his wife was then *ensient*, his Kentucky lands, "if the child should be born alive, and arrive at the age of twenty-one years, or married, whichever may first happen." Richard B. Mason, the lessor of the plaintiff, is, by the evidence in the cause, the posthumous child referred to in the codicil. This will was fully proved, and admitted to record, according to the laws of Kentucky, and was said to vest the title in Richard B. Mason.

At the trial of the cause in the Circuit Court, the plaintiffs in error requested the Court, by instructions to the jury, 1st.

To exclude the depositions of Lund Washington and George Graham, on the alleged ground that they were not taken and certified according to law.

2d. To exclude what the defendants designated as "the third codicil" annexed to the will of George Mason, which it was said was not proved and certified according to law.

3d. That the plaintiff could not recover, unless he could show that the land sued for, was entered after George Mason the elder made his will, and not patented at his death.

4th. That if from the evidence they believe that the daughters of the patentee were dead before the commencement of this suit, they should find for the defendants, as the deed from the husbands did not pass the interest of the *femes;* nor had the husbands a right by courtesy to the lands, as they never had other or further possession of the lands, than that given by deed.

The Court refused to give the several instructions prayed for, and a bill of exceptions was tendered, upon which the case was brought before this Court. The facts of the case which appeared upon the record, in connexion with the matters contained in the exceptions, are stated in the opinion of the Court.

The defendants in error insisted, 1st. That the Court should have excluded the third codicil. It was not, upon proof, ordered to be recorded by the County Court of Fairfax county. It is not certified, as having been proved, and ordered, or admitted to record. It was not proved upon the trial, by any admissible and competent proof, to have been executed by George Mason.

2d. That there was no competent proof upon the trial, that the land in contest passed by conveyance to George Mason. It does not appear that they were not patented before the date of the will of George Mason, and otherwise disposed of by him in his will. The plaintiff should have proved that the lands were acquired by the said George Mason after his will, and not having done so, the Court should have given the instructions asked for, on that point, by defendants.

3d. The Court erred in stating to the jury, that the deed conveyed to George Mason, the courtesy right of the husbands of the *feme coverts*, daughters of George Mason sen.

4th. The Court erred in refusing to give the instructions asked for by defendants, upon the other points stated in the bill of exceptions.

The case was argued by Mr. Rowan for the plaintiffs in error, and by Mr. Wickliffe for the defendant in error. In reference to the rights of the husbands in the estates of their wives, Mr. Wickliffe cited 3 *Bos. & Pull.* 643.

(Davis et al. vs. Mason.)

Mr. Justice JOHNSON delivered the opinion of the Court:—

The plaintiffs here were defendants below, to an action of ejectment, brought to recover eight thousand acres of land lying in the state of Kentucky.

The law of real estates in Kentucky, therefore, is the law of this Court, in deciding on the rights of the parties. The plaintiffs below, derives title under, 1st, a patent to George Mason of Gunston, issued in 1787—2d, a deed of bargain and sale, from seven out of nine legal representatives of the patentee, their brother, to George Mason of Lexington, executed in 1794—3d, a codicil to the will of George Mason of Lexington, devising the premises to the lessor of the plaintiffs. Judgment was rendered for plaintiffs, to recover eight-ninths of the premises. The defendants below relied on their possession, affecting to claim through the patent to the elder Mason; but adducing no evidence to connect themselves with it. The questions to be here decided are brought up by a bill of exceptions, taken by the defendants below; and they will be considered, as they regard the deduction of title, in the order in which they have been stated above.

The first question in this order, relates to the deed executed by the representatives of Mason the elder, to Mason the younger; under whose will the lessor of the plaintiffs makes title. No exception was taken to the proof, upon which this deed went to the jury. The exceptions go to the nature, and extent of the estate, which passed under it. And first, it was insisted, that it could pass nothing, unless the plaintiffs should show, that the land sued for was entered after George Mason senior made his will, and not patented at his death; on the ground that, otherwise, it passed under his will, and did not descend to these donors.

But it is obvious that this instruction was properly refused, since the fact nowhere appears in the record that the elder Mason ever made a will competent in law to transfer real estate. The deed, it is true, purports to carry into effect his intentions towards his children; but *non constat*, whether that intention had ever been signified, otherwise, than by parol or by an informal will. If a will had ever been executed, with the formalities necessary to defeat the heir at law, the defendants should have availed themselves of it by proof.

The next instruction prayed for by defendants, and rejected by the Court, was; "that if from the evidence, the jury believed that the daughters of the patentee were dead, before the suit was brought; that then they ought to find for defendants, as to the undivided interest of such daughters, and that the deed did not pass their interest. The Court instructed the

jury, that the deed did not pass the interest of the daughters, but passed the interest of their husbands, who were tenants by courtesy; although they had never had other or further possession of the land, than what they acquired by deed.

To understand this part of the bill of exceptions it is necessary to notice, that from the record it appears, that among the parties of the first part to the deed to G. Mason the younger, were four daughters of G. Mason the elder, and their husbands; that the daughters had formally executed a release of inheritance, under a commission issued from a Court in Virginia; but because the states were then separated, as a judicial proceeding, it had no validity as to lands in Kentucky; and the lessor of the plaintiffs was compelled to stand upon the interest conveyed to him by the deeds of the husbands, as tenants by the courtesy.

In order to prove the pedigree of the donors, the marriage, birth of issue, &c., and of the sons-in-law of the elder Mason, the testimony of two witnesses was introduced by plaintiffs, taken under the Act of Congress. To the introduction of this testimony an objection was made and overruled; and this constituted another ground of exception, which however has been very properly waived by the counsel in argument here. It appears that the requisitions of the Act have been well complied with.

This testimony, besides establishing the pedigree, marriage, and birth of issue &c., of the husbands and their wives, and identity of the lessor of the plaintiffs, as devisees of G. Mason the younger, also goes to prove the death of some, if not of all the daughters; and the exception is intended to raise the question, whether in the absence of evidence of actual seisin, the husbands had good estates as tenants by the courtesy, in the portions of the land belonging to their respective wives; if they had not, then by the death of their wives, their estates were determined. To repel this objection to the vesting of the estate by the courtesy, evidence is introduced into the bill of exceptions to prove, that "the adverse possession of the premises, relied on by the defendants, did not commence until after the execution of the deed, and after the death of George Mason; in other words, that the land was waste, or as is sometimes styled, *wild lands*," at the time of executing the deed, and at all times before and down to the time of the devise, from George Mason jun. to the lessors of the plaintiff took effect.

It is believed that the rigid rules of the Common Law, have never been applied to a wife's estate in lands of this description. In the state of New-York (8 *John. Rep.* 271) these rules have been solemnly repelled; and we know of no adjudged case, in any of the states, in which they have been recognised as ap-

plicable. It would indeed be idle to compel an heir or purchaser, to find his way through pathless deserts, into lands still overrun by the aborigines, in order to "break a twig," or "turn a sod," or "read a deed," before he could acquire a legal freehold. It may be very safely asserted, that had a similar state of things existed in England when the conqueror introduced this tenure; the necessity of actual seisin, as an incident to the husband's right, would never have found its way across the channel.

It is true, that Perkins and Littleton, and other authors of high antiquity, and great authority, lay down the necessity of actual seisin, in very strong terms, and exemplify it, by cases, which strikingly illustrate the doctrine. But, even they, do not represent it as so unbending as to be uncontrouled by reason.

The distinction is taken, between things which lie in livery and things which lie in grant; and with regard to the latter, the seisin in law, is enough, because they admit of no other; and as Lord Coke observes "the books say it would be unreasonable the husband should suffer, for what no industry of his could prevent;" and further "that the true reason is, that the wife has those inheritances which lie in grant, and not in livery, when the right first descends upon her, for she hath a thing in grant when she has a right to it, and nobody else interposes to prevent it." And in another place he says "a husband shall be tenant by courtesy, in respect of his wife's seisin in law, where it was impossible for him to get an actual seisin," for "the favour which the law shows to the husband that has issue by his wife *shall not be lost without some default* in him." So when describing what is livery of seisin, and defining the distinction between livery and deed, and livery in law, he says of the latter "if the feoffee claims the land, as near as he dares to approach it, for fear of death or battery, such entry in law shall execute the livery in law."

And as a proof that even in his time the Common Law had begun to untrammel itself of the rigorous rule, that livery of seisin, or entry, was indispensable to vesting a freehold; the fact may be cited, that livery of seisin was held unnecessary to a fine, devise, surrender, release or confirmation to lessee for years. The mode of conveyance, by lease and release, and some other modes, it is well known, arose out of an effort to disembarrass the transfer of titles of an idle form, which had survived the feudal system.

As it relates to the tenure by courtesy, the necessity of entry grew out of the rule, which invariably existed, that an entry must be made in order to vest a freehold; (*Co. Lit.* 51,) and out of that member of the definition of the tenure by courtesy, which requires that it should be inheritable by the issue. When a descent was cast, the entry of the mother was necessary, or the

heir made title direct from the grandfather, or other person last seised.

But in Kentucky, we understand, the livery of seisin is unheard of. Freeholds are acquired by patent, or by deed, or by descent, without any further ceremonies; and in tracing pedigree, the proof of entry, as successive descents are cast, is never considered as necessary to a recovery, or in any mode affecting the course of descent.

If a *right of entry* therefore exists, it ought by analogy to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists; as it is laid down in the books relative to a seisin in law "he has the thing, if he has a right to have it." Such was not the ancient law; but the reason of it has ceased. It has been shown, that in the most remote periods, exceptions had been introduced on the same ground; and in the most modern, the rule has been relaxed upon the same consideration. We ought not to be behind the British Courts in the liberality of our views, on the subject of this tenure. A husband, formerly, could not have courtesy of an use; that is, where his wife was *cestuy que use, (Perkins's Curtesy, fo.* 89,) and this continued to be the law, down to the time of Baron Gilbert: *(Law of Uses and Trusts,* 239,) at present it is fully settled in equity, that the husband shall have courtesy of a trust, as well as of a legal estate, (2 *Vern.* 536. 1 *P. W.* 108. *Atk.* 606,) of an equity of redemption, a contingent use; or money to be laid out in lands.

The case made out in the bill of exceptions, is one in which there could not possibly have been any default in the husbands, since the disseisin by defendants, did not take place until after the death of George Mason jr. and of consequence, after the transfer of title by the husbands, and after the devise took effect in favour of the plaintiff's lessor.

These points being disposed of, it only remains to consider the questions raised upon the introduction of the will of George Mason jr. or rather of the codicil, under which the lessor of the plaintiffs makes title.

Under a law of the state of Kentucky, and the decision of their Courts upon it, a will with two witnesses, is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will.

The objection here is, that it does not appear from the exemplified copy, that this codicil was duly proved;—because the probate does not go to that codicil, but to another; and secondly, because it appears to have been admitted to record on the testimony of a single witness.

(Davis et al. *vs.* Mason.)

The probate purports "that the two codicils were proved by the oath of Daniel M'Carty." From the exemplification it appears, that at three several dates the testator added to his will, what he calls codicils, but as there is no signature to the first, we are satisfied that the first and second were well considered as making but one; and therefore that the probate although purporting to go to two codicils only, was well considered as going to this; which but for the want of the signature to the first, would have been the third codicil. What is decisive on this subject, is, that the first two codicils have no subscribing witness, distinct from the last;—and the name of M'Carty, the witness sworn, is subscribed to the second, or as the defendants contend it should be considered, to the third codicil.

With regard to the second exception to the sufficiency of the proof of this codicil, it can only be necessary to resort to adjudged cases, as they seem conclusive to this point.

There were two witnesses to this codicil, to wit, Thompson Mason and M'Carty. M'Carty only was sworn, and the probate upon which it was ordered to be recorded, imports, that the two codicils were proved by the oath of Daniel M'Carty. In the case of Harper et al. *vs.* Wilson et al., decided in the Court of Appeals of the state of Kentucky, in 1820, in which the right to lands was in controversy, the probate was in these words, "this will was produced in Court proved by the oath of Sarah Harper, a subscribing witness thereto, and ordered to be recorded." There was another subscribing witness to the will, and exception was taken to the sufficiency of the proof. The language of the Court in that case was, "As to the proof of the execution of the will it need only be remarked that its admission to record, is sufficient to show that the witness by whom it was proven in that Court, established every fact essential to its due execution; and it is a settled rule, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it." (2 *Marshall* 467.) The same doctrine has been since fully recognised in the case of Turner *vs.* Turner, (1 *Litt. Rep.* 103,) adjudged in the same Court in 1822; and the identity of the certificate and facts in this case with those in the case of Harper *vs.* Wilson, leaves nothing for this Court to deliberate upon.

There is spread upon the record, a considerable body of testimony, taken by the Court by which the will had been previously admitted to record, and which upon the face of it, appears to have been taken in order to remove all doubt on the sufficiency of the will, and authenticity of the attestations to it. But as it does not appear to have been followed up by any order

of that Court, it was not taken into view in the bill of exceptions, and made no part of the evidence in the Court below. It therefore only required this remark in order to prevent any misapprehension on this point.

We are of opinion that there was no error in the judgment below and that it be affirmed with costs.

THE AMERICAN INSURANCE COMPANY, AND THE OCEAN INSURANCE COMPANY, (OF NEW-YORK,) APPELLANTS, *vs.* 356 BALES OF COTTON, DAVID CANTER CLAIMANT AND APPELLEE.

The Constitution of the United States confers, absolutely, on the government of the Union, the power of making war, and of making treaties. Consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. {542}

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it, and the law, which may be denominated political, is, necessarily, changed; although that which regulates the intercourse and general conduct of individuals, remains in force, until altered by the newly created power of the state. {542}

The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. They do not however participate in political power; they do not share in the government, until Florida shall become a state. In the mean time Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution, which empowers "Congress to make all needful rules and regulations, respecting the territory, or other property belonging to the United States." {542}

The powers of the territorial legislature of Florida, extend to all rightful objects of legislation; subject to the restriction, that their laws shall not be "inconsistent with the laws and Constitution of the United States." {543}

All the laws which were in force in Florida, while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognises this principle, by using the words "laws of the territory now in force therein." No laws could, then, have been in force but those enacted by the Spanish government. If among them there existed a law on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over it, was conferred by the Act of Congress relative to the territory of Florida, on the Superior Court; but that jurisdiction was not exclusive. A territorial Act, conferring jurisdiction over the same cases as an inferior Court, would not have been inconsistent with the seventh section of the Act, vesting the whole judicial power of the territory in two Superior Courts, and in such inferior Courts, and Justices of the Peace, as the legislative council of the territory may from time to time establish." {544}

(The American Insurance Company et al. *vs.* Canter.)

The eleventh section of the Act declares "that the laws of the United States relating to the revenue and its collection, and all other public Acts not inconsistent or repugnant to the Act, shall extend to and have full force and effect in the territory of Florida." The laws which are extended to the territory by this section, were either for the punishment of crimes, or for civil purposes. Jurisdiction is given in all criminal cases by the seventh section, but in civil cases, that section gives jurisdiction only in those which arise under, and are cognizable by the laws of the territory. Consequently, all civil cases arising under the laws which are extended to the territory by the eleventh section, are cognizable in the territorial Courts by virtue of the eighth section: and in those cases, the Superior Courts may exercise the same jurisdiction as is exercised by the Court for the Kentucky district. {544}

The Constitution and laws of the United States give jurisdiction to the District Courts, over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. {545}

The Constitution declares that "the judicial power shall extend to all cases in law and equity arising under it—the laws of the United States, and treaties made, or which shall be made under their authority;—to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The Constitution certainly contemplates these as three *distinct classes of cases;* and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them is conclusive against their identity. {545}

A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it existed for ages, is applied by our Courts to the cases as they arise. It is not then to the eighth section of the territorial Act, that we are to look for the grant of admiralty and maritime jurisdiction in the territorial Courts of Florida. Consequently, if that jurisdiction is exclusive, it is not made so by the reference in the Act of Congress to the District Court of Kentucky. {545}

The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not Constitutional Courts, in which the judicial powers conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power, which is defined in the third article of the Constitution, but is conferred by Congress in the exercise of its powers over the territories of the United States. {546}

Although admiralty jurisdiction can be exercised in the states, in those Courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and state governments. {546}

The Act of the territorial legislature of Florida, erecting a Court which proceeded under the provisions of the law to decree, for salvage, the sale of a cargo of a vessel which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and Constitution of the United States, and is valid; and consequently a sale of the property made in pursuance of it changed the property. {546}

(The American Insurance Company et al. vs. Canter.)

APPEAL from the Circuit Court of the United States, for the District of South Carolina.

The libel filed in this cause in the District Court of South Carolina, on the 18th April, 1825, alleged that five hundred and eighty-four bales of cotton, insured by the libellants, were shipped on board the ship *Point a Petre*, on a voyage from *New-Orleans* to *Havre de Grace* in France, and was in February, 1825, wrecked on the coast of *Florida*; from which it was saved, and carried into *Key West*, in the territory of Florida, where it was sold, without any previous adjudication by a Court of competent jurisdiction, for the ostensible purpose of satisfying a claim for salvage, amounting to seventy-six per cent. of the property saved. That the cotton thus insured, was abandoned to the underwriters, the libellants, and the abandonment was accepted by them on the 10th March, 1825.—That part of the cargo, amounting to one hundred and forty bales, subsequently arrived in the port of *New-York*, and was there proceeded against by the libellants, as their property under the abandonment. That another part of the cargo, amounting to between three hundred and three hundred and fifty-six bales, had arrived in the port of *Charleston*, within the jurisdiction of the Court, in the possession of one *David Canter*, and was fraudulently sold in *Charleston*, at auction, on the 13th of April, 1825. Restitution of this last mentioned part was therefore prayed by the libellants, and process was issued against the said Canter *in personam*.

The marshal returned to the warrant that he had taken one hundred and sixty bales of cotton, and the person of *Canter*. Fifty-four bales of the cotton, specifically brought into Court, were ordered to be sold and the proceeds paid into the Registry; and the supposed value of the remainder in dispute, to be secured by stipulation.

David Canter filed his answer claiming three hundred and fifty-six bales of cotton, as a *bona fide* purchaser, under a sale at public auction at *Key West*, by virtue of the decree of a certain Court, consisting of a *Notary and five Jurors*, proceeding under an Act of the Governor and Legislative Council of Florida, passed the 4th of July, 1823, which decree awarded to the salvors seventy-six per cent. on the nett proceeds of sale.

The testimony of witnesses was taken, and other evidence produced, relating to the title of the libellants under the insurances and abandonments thereon, and to the proceedings in the Court at Key West.

The District Judge pronounced the proceedings in the Court at *Key West* a nullity; but decreed restitution to the libellants of thirty-nine bales of the cotton only, (deducting a salvage of

fifty per cent.;) considering the evidence of the identity of the residue, as insufficient to establish their proprietary interest.

The libellants and claimant both appealed from this decree to the Circuit Court.

Further testimony was taken in the Circuit Court; and at the hearing, the decree of the District Court was reversed, and the entire cotton decreed to the claimant with costs; upon the ground that the proceedings of the Court at *Key West* were legal, and transferred the property to the alleged purchaser under them.

From this decree the libellants appealed to this Court.

The documents exhibited and evidence taken in the case, showed that three hundred and thirty-three bales of the cotton, on board the *Point a Petre*, were insured by the American, and three hundred and fifty-one by the Ocean office. The whole cargo of the ship consisted of eight hundred and ninety-one bales, but to whom the other three hundred and seventeen bales belonged, did not appear. The ship sailed on the voyage insured on the 17th February 1825, and was wrecked on Carysforth Reef, on the east coast of West Florida, about eight miles from the shore. She filled with water, and was abandoned by the captain and crew.

In the depositions taken in the cause, it was stated, that when the vessel was first seen, she was filled with water, abandoned, bilged, and lying on her broad side. The cotton was taken out of her, hove into the sea, rafts made of it, towed inside of the reef, and then put on board of vessels. The captain of the ship was picked up on the shore with his men, about fourteen miles from the wreck, and he went with the salvors to Key West, where the property saved was carried; and the proceedings for salvage were at Key West, carried on, as was alleged, with the co-operation and concurrence of the master of the ship.

The danger in saving the property was said to have been very great, the weather to have been stormy, some of the men were injured, and the saving was done during the night as well as the day; most of the cotton was much injured.

After the sale, the agent of the appellants, Mr. Ogden, came on from New York to Key West, for the purpose of attending the sale, and he expressed his willingness to pay to the purchasers of the cotton, a considerable sum, beyond what had been paid for it at the sale.

It was also in evidence, that the marks on the cotton were defaced, and that the efforts to ascertain the particular marks on that imported into Charleston by the appellee, were, to a great extent, without success. A large portion of the cotton brought to Charleston by the claimant, was sold at auction as

damaged cotton. An agreement between the two insurance companies, the appellants, was made previous to the institution of the suit, that the same should be for their joint benefit. David Canter, the appellee, claimed three hundred and fifty-six bales of the cotton, as a *bona fide* purchaser under the decree of the Court of Key West, instituted by, and proceeding under a law of the Legislative Council of Florida, passed 4th July 1823; which decree awarded seventy-six per cent. to the salvors, of the net proceeds of the sale.

The appellants filed the following "reasons of appeal."

That the decision of the Circuit Court is erroneous, inasmuch as the said tribunal at *Key West* was not legally organized, nor of competent jurisdiction in the premises.

1st. Because the Constitution and laws of the *United States* are of full force and effect within the territory of *Florida*.

2d. Because jurisdiction of salvage was not a rightful subject of legislation, with the Floridian government; and the wrecking law enacted by the same, is, in various respects, inconsistent with the said Constitution and laws.

3d. Because the Superior Courts of the said territory are vested with plenary and exclusive jurisdiction over all admiralty and maritime cases; and this was a case of that description.

4th. Because, even if the jurisdiction of the said Courts were confined to "cases arising under the Constitution and laws of the United States,"—this was a case of that class.

5th. Because the said Superior Courts were vested with original cognizance in *all cases*, where the amount in issue exceeded the value of one hundred dollars.*

* The Reporter acknowledges with pleasure, his obligations to Mr. Justice Johnson, by whom he has been furnished with a copy of the opinion delivered by him on the decision of this case.

Mr. Justice JOHNSON.—This case comes up on a cross appeal, from a decision of the District Court, adjudging a part of the *res subjecta* to the libellants, and the residue to the claimants.

The decree establishes the right of the parties libellant to recover, but dismisses the libel as to a great proportion of the cotton, on the ground of a defect of evidence to identify it.

From the pleadings and testimony, it appears that the libellants were insurers to a large amount on a quantity of cotton shipped by certain individuals, in the French ship Point a Petre, on a voyage from Orleans to Havre. That the ship was stranded and lost on the coast of Florida, and the cotton abandoned to these underwriters. That the cotton libelled, was a part of the cargo of the Point a Petre, is admitted; but it appears, that after being saved from the wreck, it was deposited at Key West, where it was sold and purchased by Canter the claimant, under the order of a municipal Court, constituted under a law of Florida, with jurisdiction over cases of salvage.

The preliminary question alone, has now been argued, to wit, whether

(The American Insurance Company et al. vs. Canter.)

David Canter claimed all the cotton except thirty-nine bales on the ground:

the sale by that Court was effectual to divest the interest of the underwriters.

The general principle is not denied, as to the mutations of property, which takes place through the intervention of Courts of Justice; but it was argued that the Constitution of the United States vests the admiralty jurisdiction exclusively in the general government—that no state can exercise a concurrent jurisdiction over admiralty and maritime causes, and that salvage was of that description. Wherefore the legislature of Florida had, in organizing this Court, exercised a power not legally vested in it, and the Act constituting it, being a void Act, it was as though no such Court existed. That moreover, the nullity of that Court did not rest merely on an inherent want of power to constitute it, but on positive prohibition contained in the Acts organizing the government of the territory to pass any laws contrary to the laws and Constitution of the United States. That the Act organizing this Court, was an Act of this nature, inasmuch as jurisdiction of causes, admiralty and maritime, were expressly vested in the Superior Courts of Florida; and, that, without the right of exercising a concurrent power over the subject, vesting this jurisdiction in an inferior Court, is *quoad hoc*, divesting the Superior Court of its jurisdiction, and rendering null the Act of Congress, which vests the admiralty jurisdiction in that alone.

On the other hand, it has been contended, that salvage is a subject of municipal and common law cognizance, not exclusively belonging to the admiralty; that although the Constitution may vest the exclusive cognizance of admiralty and maritime causes in the United States, in those instances in which the admiralty at the adoption of the Constitution, had exclusive jurisdiction of the subject, yet, in those cases, in which the common law exercised a concurrent jurisdiction with the admiralty, there is no reason for carrying the grant beyond a concurrent jurisdiction with the common law Courts of the states.

That the Court which ordered this sale, was properly a municipal Court, and a Court of a separate and distinct jurisdiction from the Courts of the United States, and as such, its acts are not to be reviewed in a foreign tribunal; of which description it was contended, were the Courts of the United States for South Carolina District. That the District of Florida was no part of the United States, but only an acquisition or dependency, and as such the Constitution, *per se*, had no binding effect in or over it; and finally that the argument drawn from the assumed fact, that the admiralty and maritime jurisdiction was by law expressly vested in another Court, originates in a misconstruction of the law, inasmuch as no Act of Congress vests in the Superior Court any other portion of the jurisdiction of the Kentucky Court, than that of causes arising under the laws of the United States; that this is not a cause of that description, it is one arising under a casualty in which no law of the United States came necessarily under review.

To this it was replied, that it was a cause arising under a law of the United States, and the case of Osborne *vs.* The Bank of the United States, was quoted and insisted on as furnishing a decision in point. That if the cause there was one of that description, because the Bank was incorporated by a law of the United States, for the same reason was this a cause of that description, because the body politic here was like the body corporate there, created by a law of the United States; and, if at every step there, the Court

(The American Insurance Company et al. vs. Canter.)

First, That he was in the *possession* of it, not tortiously, but as a *bona fide* purchaser, and that that possession, thus acquir-

was met by the law which made the one a bank, gave it power to make by-laws, and to act under those by-laws, so was it equally met here, by the laws which made this a state, gave it power to legislate, and legalized this transfer of property, under laws, which without the laws of the United States, were mere nullities.

It becomes indispensable to the solution of these difficulties, that we should conceive a just idea of the relation in which Florida stands to the United States; and give a correct construction to the second section of the Act of Congress, of May the 26th, 1824, respecting the territorial government of Florida; correct views on these two subjects, will dispose of all the points that have been considered in argument.

And first, it is obvious, that there is a material distinction between the territory now under consideration, and that which is acquired from the aborigines (whether by purchase or conquest,) *within* the acknowledged limits, of the United States, as also that which is acquired by the establishment of a disputed line. As to both these there can be no question, that the sovereignty of the state or territory within which it lies, and of the United States, immediately attach, producing a complete subjection to all the laws and institutions of the two governments, local and general, unless modified by treaty.

The question now to be considered, relates to territories previously subject to the acknowledged jurisdiction of another sovereign; such as was Florida to the crown of Spain. And on this subject, we have the most explicit proof, that the understanding of our public functionaries, is, that the government and laws of the United States do not extend to such territory by the mere Act of cession. For, in the Act of Congress, of March 30th, 1822, section 9th, we have an enumeration of the Acts of Congress, which are to be held in force in the territory; and, in the 10th section an enumeration, in nature of a bill of rights, of privileges, and immunities which could not be denied to the inhabitants of the territory, if they came under the Constitution by the mere Act of cession.

As, however, the opinion of our public functionaries is not conclusive, we will review the provisions of the Constitution on this subject.

At the time the Constitution was formed, the limits of the territory over which it was to operate were generally defined and recognised. These limits consisted in part, of organized states, and in part of territories, the absolute property and dependencies of the United States. These states, this territory, and future *states* to be admitted into the Union, are the sole objects of the Constitution; there is no express provision whatever made in the Constitution for the acquisition or government of territories beyond those limits.

The right, therefore, of acquiring territory is altogether incidental to the treaty-making power, and perhaps to the power of admitting new states into the Union; and the government of such acquisitions is, of course, left to the legislative power of the Union, as far as that power is uncontroluled by treaty. By the latter we acquire either positively or *sub modo*, and by the former dispose of acquisitions so made; and in case of such acquisitions, I see nothing in which the power acquired over the ceded territories, can vary from the power acquired under the law of nations by any other government over acquired or ceded territory. The laws, rights and institutions of the territory so acquired remain in full force, until rightfully altered

ed, is good against all but the person who proves a better title to this identical cotton.

by the new government. In the present instance, however, the laws of Florida were not left to derive their force from general principles alone; for by the 13th section of the same Act it is declared, "That the laws in force in the said territory at the commencement of this Act, and not inconsistent with the provisions thereof, shall continue in force until altered, modified or repealed by the legislature.

From these views of the subject it results,

1st. That whatever may be the correct idea of the distribution of the admiralty jurisdictions as between the states and United States, it can have no application here, since this territory does not stand in the relation of a state to the United States.

2ndly. That whether salvage be of admiralty jurisdiction exclusively or not, it is immaterial to this cause, since the whole power of legislation over the subject in Florida, existed exclusively in the general government.

3dly. That the general principles of international law, on the immunities of foreign courts and foreign decisions, have no application here, since the Courts of Florida have a common origin with this Court—our authority flows from the same source—we are connected at the fountain head, governed by the same legislative power, and have equal access to the laws which constitute and governs us. It follows, that neither can regard the decisions of the other, if acting without authority derived through the legislature of the Union.

The Act entitled "An Act for the establishment of a territorial government in Florida," and the Acts in *pari materia*, of the 3d March 1823, and the 26th May 1824, constitute what may be properly termed the Constitution of Florida. The first provides for the appointment of an executive, with powers not material here to be considered. It constitutes a Legislature, organizes a Judiciary, and imposes upon the one and the other some general restrictions, subject to which they are empowered to exercise the legislative, judicial and executive powers which belong generally to an organized government.

The Act of March 1823 goes over the same ground, and repeals the preceding Act so far as the provisions of the latter are inconsistent with those of the former Act. And with regard to both, or either, as far as the latter remains unrepealed, the position is incontrovertible, that the legislative power could enact nothing inconsistent with what Congress has made inherent and permanent in the form of government of the territory. Therefore, if the admiralty jurisdiction is made inherent in the Superior Courts, it was not in the power of the territorial legislature to transfer it to any inferior tribúnal.

To determine this question, we must examine the provisions of the several acts, touching the exercise of legislative and judicial power.

In defining the legislative power, the words of the Act of 1822 are these, "they shall have power to alter, modify, or repeal the laws, which may be in force at the commencement of this Act. These legislative powers, shall, also, extend to all the rightful subjects of legislation; but no law shall be valid, which is inconsistent with the Constitution and laws of the United States, or which lay any person under restraint, burthen or disability, on account of his religious opinions, professions or worship; in all which he shall be free to maintain his own, and not to be burthened with those of another."

(The American Insurance Company et al. vs. Canter.)

Second.—That the salvors had a rightful lien upon the cargo saved; that the captain of the Point a Petre was agent for the

The language of the Act of 1823 is, "they shall have legislative power over all rightful subjects of legislation; but, no law shall be valid, which is inconsistent with the Constitution and laws of the United States; or, which lay any person under restraint, &c."

That jurisdiction of salvage, is a rightful subject of legislation, is not to be questioned. The jurisdiction then vested by the legislature in this municipal Court, must be sustained, unless inconsistent with the laws or Constitution of the United States. But with the Constitution, in legislating on the subject of salvage, there can be no incongruity; it is only therefore the supposed inconsistency, with the Act of Congress of May 1824, that can impugn it.

The provisions of that Act upon this subject, are these:—

"Each of the said Courts, (meaning the superior Courts of the district of Florida,) shall moreover have and exercise the same jurisdiction within its limits, *in all cases arising under the laws and Constitution of the United States*, which, by an Act to establish the judicial Courts of the United States, approved the 24th day of September 1789, and 'an Act in addition to the Act entitled an Act, to establish the judicial Courts of the United States, approved the 2d March 1793,' was vested in the Court of Kentucky district."

The question then is reduced to this, in what cases, *arising under the laws and Constitution of the United States*, is jurisdiction vested in the Court of Kentucky district, by the two Acts of the 24th September 1789, and the 2d of March 1793.

It has been erroneously assumed, that *all the jurisdiction* vested by those Acts in the Kentucky Court, was vested by this law in the superior Court of Florida; it is expressly confined to *cases arising under the laws and Constitution of the United States;* and the reason is obvious. In all cases arising under the laws of the district, jurisdiction is given by the preceding section of the same Act; but as most of the laws of the United States, had been made of force in the territory as before observed, the 2d section is intended to extend the jurisdiction of the Court to cases arising under the latter laws, and further, if necessary, to all cases arising under laws of the United States, over which jurisdiction had been given to the Kentucky Court—a practice in defining jurisdiction, that had been pursued by Congress, with regard to all the territories subsequent to the time when the Kentucky Court was established.

In the original organization of the judiciary of the United States, Kentucky and Maine were excluded from the arrangement of circuits. And, as no Circuit Court was required in law to be held there, the District Court was vested with Circuit Court jurisdiction.—This is the whole purport of the Act of 1789, referred to in the Florida Act of 1824. The other Act there referred to, to wit, that of 1793, has no other operation as to the Kentucky Court, besides vesting in it the power given to the Circuit Courts to hold special sessions.

If the Florida Act were as broad in its operation as the two Acts referred to, it would indeed be a serious question, whether the legislature of Florida could divest its superior Court of any part of its admiralty jurisdiction, as existing in and exercised by the District Courts of the United States. But I think it incontestable, that the jurisdiction here given is explicitly restricted to so much of the jurisdiction of the Kentucky Court only, as comes

underwriters, and had authority to settle the amount of that claim, either by agreement, or an award of third persons; that

within the description of *cases arising under the laws and Constitution of the United States.*

Now, excepting in the single instance of the present Bank of the United States, Congress never has vested a jurisdiction even in its Circuit Courts, generally, over *causes arising under the Constitution and laws of the United States.* It has given an appellate jurisdiction, and that only to the Supreme Court, over causes of that description, when such causes arise in the state Courts, but we look in vain through the law defining the jurisdiction of the Kentucky Court for any general claim to jurisdiction under the description of "cases arising under the laws and Constitution of the United States."

Yet, very ample operation must be given to these words of the Florida Act, considered in reference to the jurisdiction actually possessed and exercised by the Kentucky Court, under the two laws of 1789 and 1793. The land laws, revenue laws, laws of trade, criminal laws, and many other public laws, were all laws of the United States, under which, cases might arise, and over which the Kentucky Court, was undoubtedly vested with jurisdiction. Nor do I doubt, that the admiralty jurisdiction, over revenue cases, as exercised by the Kentucky Court, is rightfully vested, (and that beyond the control of the Florida legislature,) in the Superior Court of this district.

But here it appears to me, the grant of jurisdiction terminates. The admiralty jurisdiction, beyond this limit, is left to be administered under the laws of the territory, for this simple reason, that other causes, occurring in the admiralty, cannot be brought within this description of causes, arising under the laws of the United States—at least, this appears incontrovertible, when applied to questions of salvage arising on wreck of the sea—to questions of salvage on captures as prize of war, I am inclined to think it would extend, at least, to all causes, in which the distribution of prize money, depends upon laws of the United States.

But it is argued, that this is a cause arising under the laws of the United States, within the reason of the decision of the Supreme Court, in the case of Osborne *vs.* The Bank of the United States; that the validity of the sale, divesting the interests of these libellants, depends upon the legality of the powers, exercised by the Court of Key West, which depends upon the powers vested in the legislature of Florida, which finally depends upon the Acts of Congress, which created the body politic of Florida—that creating a body politic, is only creating a body corporate on a larger scale, but essentially the exercise of one and the same power—that whether the one or the other sues or defends, legislates or acts, by itself or its agents, all must be done with reference to the law that creates and organizes it; and in fine, in the language of the Court, in the case cited, "the charter, not only creates it, but gives it every faculty that it possesses. The power to acquire rights of any description, to transact business of any description, to sue on those contracts, is given and measured by its charter, and that charter is a law of the United States. This being, can acquire no right, make no contract, bring no suit, which is not authorized by a law of the United States. It is not only itself the mere creature of the law, but all its actions, and all its rights, are dependent on the same law," &c.

I have taken a week to reflect upon this question alone, and I cannot withhold from the gentleman, who argued the cause for the libellants, an acknowledgment, that I have not been able to draw any line of discrimina-

he applied to these third persons, and agreed to their proceedings, and to the sale; that the sale was afterwards ratified by Ogden, the special agent of the underwriters.

tion, between this and the decided cause, which satisfies my mind. Yet, I am thoroughly persuaded, that the learned men who decided that cause, never contemplated that such an application would have been given of their decision. I am happy in the prospect that this cause will finally be disposed of elsewhere, not doubting, that the mental acumen of those who decided the other, will be found fully adequate to distinguish or reconcile the two cases, on grounds which have escaped my reflections. At present, I must content myself with observing, that it is too much to require of a Court, upon mere analogy, to sustain an argument, that not only proves too much, if it proves any thing, but which leads, in fact, to positive absurdity.

It will be recollected, that it is not only in the territories that we find bodies politic created by the laws of the United States, but that near one half the states derive their origin and admission into the Union, under laws of the United States. But will it be contended that all the causes arising under their laws, are causes arising under laws of the United States? It is true, that in the District of Columbia, the appellate jurisdiction given to the Supreme Court, can be maintained only on the ground that the laws of that district are laws of the United States; and that all the laws of the District of Florida derive directly, or indirectly, their force from the same origin. But in the case of the District of Columbia, this power is expressly given to the Supreme Court, and we are not now inquiring whether Congress might not have vested this jurisdiction in the Superior Court of Florida, but whether they have so vested it. The simple inquiry is, what force and operation is to be given to those words, in the second section of the Act of 1824, "Jurisdiction in all cases arising under the laws and Constitution of the United States?" And what could be more absurd than to decide, that the same force is to be given to those words as if they were not there. Expunge that sentence altogether, and the construction of the clause will be necessarily and precisely that contended for by the libellants, to wit, an unrestricted grant of the jurisdiction vested by law in the Kentucky Court. It not unfrequently happens, that in the construction of a whole law, or a section, or a clause of a law, words, or even sentences, are declared surplusage, or irreconcilable with other words or sentences; but here we are called upon to give a meaning to words, which deprives them of all meaning, and that without any incongruity with other words, or want of distinct meaning in themselves, but from an analogy with another case, in which similar words have received a construction which produces that consequence, when applied to these words.

Until better advised, I must maintain that these words have a definite meaning and bearing in their place in this law, and amount to a restriction of the jurisdiction of the Superior Court of Florida, to a class of cases which does not comprise salvage on wreck of the sea.

Some minor grounds have been dwelt upon in argument, of which it is proper to take a brief notice.

It has been argued that the Superior Court of Florida acquired jurisdiction in another way; to wit, that the 9th section of the Florida Act, of 1822, makes of force in the territory, all public laws of the United States, not repugnant to the provisions of that Act. That the judiciary Acts are Acts of that description, and, therefore, are laws of the territory. But this argument is without point, until such an organization of Circuit and District

(The American Insurance Company et al. *vs.* Canter.)

Third.—He claims the whole three hundred and fifty-six bales, on the ground of a sale by a Court of the territory of Florida.

Courts of the United States takes place in that territory, as will admit of the application of this law to the jurisdiction of its Courts. Or rather, it takes effect as to the subject now under consideration, only through those clauses which relate to the jurisdiction of the Kentucky Court, and thus returns, in a circle, to the argument which we have been before considering.

It has also been contended that the Florida Act, under which the Court at Key West was organized, is void. 1st. Because never ratified by Congress; and 2dly, because inconsistent with that provision of the first section of the Act of 1824, which gives original jurisdiction to the Superior Courts of the territory, in all cases of 100 dollars in value.

To the first of these reasons, the 5th section of the Act of 1822, furnishes an unequivocal answer. It is only the right of *repealing* that Congress retains over the laws of Florida. That clause which requires the Governor to report the laws of the territory to the President, to be laid before Congress, is merely directory, but has no bearing upon the validity of those laws, until repealed. The words are "which if disapproved by Congress, shall *thenceforth* be of no force;" necessarily implying their previous operation.

With regard to the second, I have no doubt but that the individual who chooses to resort to his common law remedy, of an action for work and labour, instead of libelling for salvage, may maintain an original suit in the Superior Court of the territory. But I see nothing in the Act which makes that jurisdiction exclusive, in a case in which both remedies are open to the choice of the party. The language of the 6th section is, "That the judicial power shall be vested in two Superior Courts, and in such inferior Courts, and justices of the peace as the legislative council of the territory may from time to time establish." The 7th section of this Act, and the 2d of the subsequent Act, confine to the Superior Courts exclusively, the jurisdiction over the cases arising under the laws, &c. of the United States, of which the Kentucky Court had jurisdiction—but as to all others, I perceive nothing in the law which precluded the Florida legislature, from making any distribution of jurisdiction consistent with preserving to the Superior Court a concurrent jurisdiction, to be exercised according to its own terms.

It is proper to remark here, that whatever may be the fact as to the integrity and propriety, which regulate the proceedings of the Court at Key West, there is nothing novel or unprecedented in the organization of that Court. The model of it is of great antiquity, and throughout the civilized world, some such summary mode of adjusting salvage, in cases of wreck of the sea, is to be found. We had just such a Court here, and I believe in most of the states, when the Constitution was adopted; and although jurisdiction of the subject has been every where abandoned to the District Courts of the United States, where it is generally adjusted with great solemnity and discretion, and I believe, very much to the satisfaction of all the commercial world, there exists no reason to preclude the Congress of the United States from constituting similar summary tribunals, whenever and wherever it may become necessary. The establishment of this tribunal, therefore, however justice may be distributed in it, is no unwarrantable exercise of the legislative or judicial power vested in Florida.

Finally, I am of opinion that there is error in the decision of the District Court, and adjudge that it be reversed, and the goods restored to the claimant with costs.

H. N. Cruger, for libellants, King and Gadsden, for claimant.

Fourth.—That was a *foreign* Court, acting under a *municipal* law, and having the property within its reach; its jurisdiction cannot be inquired into.

Fifth.—If the jurisdiction of that Court can be inquired into, they contend that jurisdiction was conferred upon it:

Sixth.—With the 8th section of the Act of Congress of the 3d March 1823, which is in these words: "That each of the said Superior Courts shall moreover have and exercise the *same jurisdiction* within its limits, in all cases arising under the laws and Constitution of the United States, which by an Act to establish the Judicial Courts of the United States, approved the 27th September 1789, and an Act in addition to said Act, approved the 2d of March 1793, was vested in the Court of Kentucky District."

The case was argued by Mr. Ogden for the appellants, and by Mr. Whipple and Mr. Webster for the claimants:

Mr. Ogden—

The great question in this case is the validity of the proceedings of the territorial Court; and upon the threshold of this inquiry it is asked, how far it is competent for this Court to examine the constitutionality of the Court at Key West, and the legality of its proceedings.

The libel filed in the District Court, sought the restoration of the cotton, subject to a reasonable salvage. The claimant asserts his right to it under a sale, and the inquiry is, whether the property was changed by the proceedings directing the sale. The decision upon this inquiry, rests upon the right of the Court to take jurisdiction of the subject matter.

The common law rule is, that when a Court acts within its powers, its acts are binding on all the world; but if beyond them, they are entirely void. It is therefore necessary to look into the constitution of the Court. *Abbot on Ship.* 11 *ed.* 16 *n. Starkie* 215. 9 *Mass.* 462. 3 *Wheat.* 234.

The next inquiry is into the nature of the case, of which the Court took cognizance; and then, whether it was within its jurisdiction?

It was a case of salvage, and salvage is of admiralty jurisdiction. 1 *Wheat.* 335—*Sergeant's Constitutional Law*, 206.—In England there was a great contest upon this question, but it was finally settled in favour of the jurisdiction of the admiralty, by the statute of Rich. 3d. *Abbot on Ship.* 433.

It is now to be inquired, could the Court at Key West, lawfully exercise admiralty jurisdiction?

The Constitution was made for the whole people of the United States, without reference to their being within the original thirteen states.—The 3d article 2d section defines, "the judicial powers," and declares "it shall extend to all cases of admiralty and maritime jurisdiction."

(The American Insurance Company et al. vs. Canter.)

The treaty with Great Britain of 1783, ceded a large tract of country to the United States, a great portion of which, if not the whole, was within the limits of the thirteen states, and was claimed by several of the states, but was afterwards ceded to the United States.

Thus the United States became possessed of all these territories by cession, all of which, except that ceded by Georgia, having been acquired under the confederation, the people upon those territories became citizens of the United States by those cessions, and were entitled to all the rights and privileges of citizens.

In the articles of confederation, there is no provision for acquiring rights to lands; but on the contrary, the lands within the territories of the several states, were considered as belonging to those states. By what authority did the confederation acquire a right to the lands ceded to them? Whence then, did the confederation draw the capacity to take and hold those lands? Not from any municipal regulations, or from the laws of the states; or from the express terms of the articles of confederation; but from the great principles of public law. The powers of Congress were to make war, and peace, and to make treaties; and in those and the other powers, were included those under which territories were acquired and governed.

That Congress considered themselves possessed of those powers is shown by the resolutions of 6th September 1780, and 10th October 1780, recommending to the states to cede their unappropriated lands—and also by the ordinance for the government of the territory north-west of the river Ohio, passed 13th July 1787.

That the inhabitants of the territories thus acquired, were citizens of the United States, is manifest from the fact, that as soon as they were sufficiently numerous to protect themselves, and to form a state government, they became a part of the Union. The territories to which these observations apply, were not part of the nation at the time of the establishment of the Constitution.

The Circuit Court in delivering their opinion, draw a distinction between territories so situated, and those which were afterwards acquired. Is there any foundation for this distinction?

The rights of the United States to hold territories, not a part of the nation at the time of the confederation, in the same manner as the right to all those within the original thirteen states, is derived from the same universal principles of general law; from the powers of making peace, and war, and of making treaties, &c. It is necessary for the peace of the Union, that they should possess those powers.

In what relation then, do the inhabitants of an acquired ter-

ritory, stand to the United States? Are they citizens, or subjects? This is a grave question, and merits the serious consideration of the Court.

The first territory acquired by the United States, was Louisiana; and by the third article of the treaty, as well as by subsequent legislative Acts, the inhabitants of the country became entiled to the privileges of citizens. The acquiescence of the people of the United States, fully establishes, that the powers exercised in reference to Louisiana, were properly exercised.

The third section, fourth article, of the Constitution, authorizes the admission of new states into the Union. This section of the Constitution, gives to Congress a power, only limited by their own discretion, to admit as many states as they may think proper, in what manner soever the territory composing those new states may have been acquired.

After the acquisition of Louisiana, Congress considered and treated the people of the country in the same manner they considered the inhabitants of every other territory of the United States,—as a part of the nation at the time of the confederation. The various legislative Acts in reference to Louisiana, establish this position.

The next great acquisition of the United States by cession from a foreign government, was that of Florida from Spain. The sixth article of the treaty declares, "The inhabitants of the territories which his Catholic Majesty cedes to the United States by this treaty, shall be incorporated into the Union of the United States, as soon as may be consistent with the principles of the Federal Constitution, and admitted to the enjoyment of all the privileges, rights and immunities of citizens of the United States."

The provisions of this article, in all respects similar to that on the Louisiana treaty, stipulating for the privileges of the inhabitants of the country, authorize the belief that the government of the United States doubted their power under the Constitution to receive a cession upon any other terms, than that the people inhabiting the country should be citizens of the United States.

The Act of Congress entitled "an Act for the establishment of a territorial government in Florida," followed this treaty, and was passed 20th March 1802.

The fifth section of this Act constitutes a legislative body for the territory, and declares that their legislative powers, shall extend to all the rightful subjects of legislation; but no law shall be valid, which is inconsistent with the Constitution and laws of the United States. The sixth section establishes the judicial power, and appoints a *superior* Court, and gives the territorial

legislature power to establish *inferior* Courts. The seventh section prescribes the jurisdiction of the Superior Court, and declares that the said Superior Court shall have and exercise the same jurisdiction within its limits in all cases arising under the laws and Constitution of the United States, which was vested in the Court of the Kentucky district, by the Judiciary Act of 1789; and the Act in addition thereto, of 2d March 1793; and writs of error and *appeal* from the decision in the said Superior Court, *authorized by this section of the Act*, shall be made to the Supreme Court of the United States in the same cases, and under the same regulations, as from the Circuit Court of the United States. By the eighth section, the Judges of the *Superior* Courts and other officers, are to be appointed by the President, by and with the advice and consent of the Senate; and all the Judges are to take an oath to support the Constitution of the United States, before they enter on the duties of their office; and the salaries of the Governor, Judges, &c. are to be paid out of the treasury of the United States.

The 9th section declares, that certain Acts of Congress which are enumerated in the section, "and all other public laws of the United States, which are not repugnant to the provisions of this Act; shall extend to, and have full *force* and effect, in the territory aforesaid."

The 14th section provides for the appointment of one delegate to Congress, for the territory.

The Circuit Court, in their opinion in this case say, "they have the most explicit proof, that the understanding of the public functionaries, is, that the government of the United States does not extend to such territories, by the mere act of cession. For in the Act of Congress, of March 1822, section 9th, we have an enumeration of the Acts of Congress, which are to be held in force in the territory; and, in the 10th section, an enumeration in the nature of a bill of rights of privileges, and which could not be denied to the inhabitants of the territory, if they came under the Constitution, by the mere act of cession."

An examination of the Act, will show that it does not warrant this construction. The 5th section declares no law shall be passed by the territorial legislature, which is inconsistent with the Constitution and laws of the United States. This shows that Congress did consider the Constitution and laws as extending there. Why prohibit the passage of a law inconsistent with them, if they had no operation there?

The 7th section gives the Supreme Court *jurisdiction* in all cases, under the laws and Constitution of the United States. Those laws must therefore have been considered to extend

there, or why empower their enforcement by the Supreme Court?

The 8th section provides for the appointment of the officers of the government, including the Judges of the Supreme Court, by the President, by and with the advice of the Senate. This manifests the admission that the Constitution extends there; as by the Constitution this mode of appointment is established.

The law also provides, that the officers of the territory, appointed according to its purposes, shall take an oath to support the Constitution of the United States. Why take this oath, if that Constitution does not extend to the territory? The payment of the officers of the territory, out of the Treasury of the United States, which could not be constitutionally authorized by Congress, unless the Constitution operated there, may also be referred to, as evidence of the principles contended for by the appellants.

Because Congress have enumerated certain laws as extending to the territory, in the 9th section of the Act, it is inferred, that Congress desired none other should extend there, and that, without such enactment, none would have been in operation there.

The language of the section disaffirms this position. After enumerating certain Acts, it closes with a provision "That all the other public laws of the United States, which are not repugnant to the provisions of this Act, shall extend to, and have full force in the territory." By the enumeration of "some laws," it is therefore evident that Congress did not mean to exclude those not enumerated. But it is said, the 10th section contains an enumeration in the nature of a bill of rights, of privileges, which, if the Constitution extended there, could not be denied. This is not admitted. The introduction of this provision, was necessary, for the purpose of controlling the powers granted by the local legislature, and to secure to the inhabitants rights which they had under the Constitution, but which might have been otherwise infringed, unless provisions were made to carry the principles of the Constitution into effect.

It has been shown: 1st. That the people in the territories of the United States are citizens of the United States, entitled to all the benefits derived from the laws and Constitution of the United States, and subject to all the provisions of the Constitution, and the laws passed under it.

2. That in principle, there can be no difference between a territory formed out of a country, within the old limits of the United States, and a territory in newly acquired country.

3. And that, therefore, the people of Florida, immediately

upon its cession, or at any rate upon the passing of the Act instituting the territorial government, became citizens of the United States, to whom the laws and Constitution extended.

The inquiry now is, whether in establishing the Court or tribunal by which the cotton claimed in this case was ordered to be sold, the legislature of Florida have not violated the Constitution of the United States, and the laws of Congress passed under it. If they have, then the Court is an illegal Court, and all its acts are void.

It is not only upon general principles, that the act of establishing the Court is invalid, but also by the provision of the Act of Congress, which prohibits the passing any law, inconsistent with the laws and Constitution of the United States.

In the article of the Constitution relative to the judicial power of the government, it is declared, that it shall extend to all cases of *admiralty* and *maritime* jurisdiction. It has been shown, that the provision applies to territories as well as states; the Constitution being necessarily paramount within the limits of the United States.

The Constitution having vested the judicial power in a Supreme Court, and such inferior Courts as Congress may from time to time establish, the legislative power under this provision has been exercised by the Acts of March 1822 and 1823. *Superior* Courts have been erected, to which, in addition to the powers of territorial Courts, jurisdiction is assigned within its limits in all cases arising under the laws and Constitution of the United States, which, by the Judicial Acts of the United States, was vested in the Court of Kentucky district, with a right of appeal, and a writ of error to this Court.

By the same Acts, authority is given to the territorial legislature, to establish inferior Courts strictly territorial, and the jurisdiction of which, extends to subjects not within the cognizance of the tribunals of the Union.

What are the powers, of the Court of the Kentucky district?

Among other subjects of jurisdiction in the District Court of the United States, it is declared, by the ninth section of the Judiciary Act of 1799, "that they shall have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under the laws of import, navigation and trade of the United States, where the seizures are made on waters which are navigable from the sea by vessels of ten or more tons burthen." Thus the Kentucky district had exclusive cognizance of cases of admiralty and maritime jurisdiction, and consequently, it has exclusive control over cases of salvage.

The tenth section provides, that the District Court of Kentucky shall, besides the jurisdiction aforesaid, have jurisdiction

of all other causes, except of appeals made cognizable in a Circuit Court, &c.

It follows from the provisions of the Act relative to the territorial government, and its reference for the jurisdiction of the Superior Court, to that existing in the Court of the Kentucky district, that in the Superior Court of Florida, there is *exclusively* jurisdiction over admiralty and maritime causes, and of course, of the claims of the salvors of the cotton, comprising part of the cargo of the Point a Petre. The jurisdiction is *exclusive*, for it could not be given to the territorial Courts by an Act of the territorial legislature, they not having the power to give it; the laws of the United States, having vested it in the Supreme Court, having similar powers to the District Court of Kentucky, and the powers of the territorial Court being limited within the observance of the provisions of the laws of the United States.

Independent of the restriction imposed upon the territorial legislature, by which they were disabled from giving admiralty and maritime jurisdiction to the inferior Courts of Florida, the Constitution of the United States would have been violated by such legislation. The Constitution is the supreme law of the land; and, if without a prohibition in the territorial law, the legislative authority of Florida could not "coin money" or "issue bills of credit," the establishing of a Court with admiralty and maritime jurisdiction, would be equally repugnant to the Constitution; such jurisdiction being exclusively, by the Constitution, in Courts established by Congress.

It is said in the opinion of the Circuit Court, that the jurisdiction in cases of salvage, is not vested by Congress in the Superior Courts of Florida. A reference to the laws establishing the Court of the district of Kentucky, and to the Act relative to Florida, authorizes a different position. Jurisdiction is given by those laws, "in cases arising under the Constitution and laws of the United States." What is such a case? Is not the extent of the judicial power of the Courts of the United States, a question arising under the Constitution? The Constitution having declared, that the judicial power shall extend to cases of admiralty and maritime jurisdiction, is not a case of admiralty jurisdiction a question of this character? A prohibition in a state Court in a case of admiralty jurisdiction, and a plea interposed, that exclusive cognizance of admiralty cases is in the Courts of the United States, would at once raise a question under the Constitution. The principle seems to be, that whenever a case arises, in which the question is as to the jurisdiction of the Courts of the United States, it is necessarily and always a question arising under the Constitution and laws of the United States.

(The American Insurance Company et al. vs. Canter.)

A case of salvage does not, strictly speaking, arise under the laws and Constitution of the United States, as the right to salvage depends on the principles of maritime law; but the *amount of salvage*, depends on the decision of a Court, guided by the circumstances of the case, and exercising admiralty and maritime jurisdiction. Thus, as the jurisdiction over the case is given by the Constitution, the decision upon it, becomes a case arising under the Constitution.

Whether a man is bound to pay a promissory note is not a question of this description, and yet in cases of promissory notes held by the Bank of the United States, this Court have always decided that the Courts of the United States have jurisdiction; because all actions brought by the bank, are cases arising under the Constitution and laws of the United States. Congress could give this Court jurisdiction of such cases, on no other principle.

If then, under a clause in the Constitution extending the judicial power of the United States to all cases arising under the Constitution and laws of the United States, this Court will sustain jurisdiction upon a promissory note, with the making of which, and the extent of the liability of the parties thereto, the Constitution and laws of the United States have nothing to do. —If those liabilities are questions arising under a different law, and the jurisdiction is sustained by the Court, only in the particular case of the Bank of the United States, as a case arising under the Constitution and laws of the United States; why is a different rule to apply in a case of salvage, of which the exclusive jurisdiction is given by the Constitution and law of the United States to the District Court? Is not the one as much a case arising under the laws of the United States, as the other?

Upon the whole, it is contended, that the Superior Courts of Florida, having the same jurisdiction in cases arising under the laws and Constitution of the United States, as the District Court of Kentucky had, under the Acts of Congress; and as the District Court of Kentucky has exclusive jurisdiction in all civil cases of admiralty and maritime jurisdiction; that, therefore, the Superior Courts in Florida have exclusive jurisdiction in all civil, admiralty and maritime cases—that salvage is a case of admiralty and maritime jurisdiction—and that, therefore, any law of Florida, giving jurisdiction in a case of salvage to any other Court is unconstitutional; and all the acts of the Court under it, are void.

Mr. Whipple and Mr. Webster for the claimant.

Mr. Whipple contended:—

1. That Canter was a purchaser at Key West of the property in question, which was sold by the *consent* of the *owners*.

After the disaster and abandonment, the captain of the Point

a Petre, acted as agent to the underwriters. When the cotton arrived at Key West, the salvors and the captain were owners of it as tenants in common. The captain had a legal right to *sell* the proportion that belonged to the underwriters, or to consent to a division of it, through the agency of a Court.

He chose the latter mode. *He himself* with the salvors, applied to the justice to issue process; and he co-operated in all the subsequent proceedings, and he received his proportion of the sale of the part of the cargo which was saved. These acts were subsequently ratified by the agent, who it is in evidence offered the claimant 7500 dollars for his bargain.

Upon these facts it is contended, that the consent of the party operates as a *change of title to the property*. It will not supply a defect of power in the Court, acting *as a Court*, but the Court is the mere organ of the *will* of the *party*. As between the *original parties*, a plaintiff may take advantage of the want of jurisdiction of the Court to which he has resorted. But can *he* obtain judgment, proceed to execution, obtain a sale, under which a *third person* purchases; and then dispute the title of that third person, for an alleged want of jurisdiction in the Court?

The Court at Key West had jurisdiction, and its decree cannot be questioned.

It may be proper to consider in the first place, whether the jurisdiction of the Key West Court, can be inquired into by this Court? Was it not the judge of its own jurisdiction? It was a *municipal Court*, acting, *in rem*, under a *municipal law*. 2 *Dal.* 273. 2 *Blac. Rep.* 977. 4 *T. R.* 191. 2 *H. Blac.* 410. 4 *Cranch*, 271. 268. 275–6. 293. 3 *Wheat.* 236, *note.* 15 *John.* 144. 1 *Stark.* 215–16. 9 *Mass.* 46. 9 *East*, 192.

In Rose *vs.* Himely, 4 *Cranch*, 268, it is said, "but of their own jurisdiction, so far as it depends on *municipal* laws, the Courts of every country are the exclusive judges."

Can the Key West Court be considered a *foreign* Court? It was constituted by Congress, or by a power derived from Congress; yet it may be considered that the United States has *two* sovereignties, one over the *people* of the *United States*, the other over the *territories*; and that they are as *foreign* to each other, as the parliament of England, and the legislature of Jamaica; and that the Courts of each are as foreign as the Courts of Westminster and Kingston. Perhaps a distinction may be also taken between the power of this Court, to inquire into the jurisdiction of another Court, in a case in which a *third person*, not a party to the original suit, *defends* his right to the property purchased under that judgment, and a case where a party to the original judgment, seeks to enforce that judgment in this Court, and thereby to acquire *new rights* under it. Another

distinction may be taken between a defect of jurisdiction, in consequence of the absence of some *fact* necessary to confer jurisdiction, and that want of jurisdiction which arises from the different construction put upon a municipal law by this Court, from the construction adopted by the municipal Court.

Instead of considering the territorial Court of Florida, a strictly *foreign* Court, suppose the same right to inquire into its jurisdiction, that exists to inquire into the jurisdiction of a *state Court*, is admitted.

As a general principle, it is true, that the proceedings of a Court are void, unless it has jurisdiction over the subject matter. This however, like all general rules, has its limits and its qualifications.

Whether the *subject matter*, (the person, or property,) is within the *power* of the Court, is a question of fact, to be decided, generally, by the return of an officer. The Court may be supposed to act upon the existence of that fact. When it is proved in another Court, that the Court whose jurisdiction is questioned had been deceived as to that essential fact, it does not impugn its judgment, to say that it acted without jurisdiction.

But the construction of the statutes of the states, is peculiarly the province of the Courts of the state; and a uniform construction becomes the settled law of the state. The jurisdiction cannot be settled in any other way, than by the Courts of the state. It presents a question of *law*, and the decision of that question, though it relates to jurisdiction, is as binding upon the *parties*, as though it related to the merits of the case. The question as to the extent of the *power* of the Court under a statute, is a question of law, and the decision *conclusive* on the *parties*.

The Courts of Florida alone, are to construe the Acts of Congress in relation to the jurisdiction of Florida. Had the justice, at Key West, jurisdiction of the question of salvage?

By the territorial Act of 1823, called the "Wreckers' Act," it is admitted, that sufficient authority was given to the Justice over this subject. The question arises out of the Act of Congress of March 1823; and is this, does that Act of Congress grant sufficient *power* to the legislature of Florida to pass such a law?

The Act of Congress of March 1823, authorizes the territorial legislature, "to legislate upon *all* rightful subjects of legislation."

It makes it the duty of the governor to lay before Congress, annually, all the Acts passed by the legislature. If either of those Acts are *disapproved* of by Congress, it is, from *thenceforth*, to be of no effect. The Act concerning wreckers was laid be-

fore Congress in December 1823, and its attention particularly pointed to that subject, by a memorial in which the necessity of such a law was enforced. Congress did not disapprove or annul that law, untill 1826. In the opinion of Congress, then, this law did not violate the provisions of the Constitution, or of any general law of the United States.

It ought to be noticed, that the right conferred on the territorial legislature "to legislate upon all rightful subjects of legislation," was qualified by the condition, that no law should be valid "if inconsistent with the Constitution or laws of the United States."

Much argument has been used in order to show that the Constitution and laws of the United States are, *per se*, in force in Florida, and that the inhabitants are citizens of the United States.

How the Constitution became of force in Florida has not been shown. Was it by the Act of cession? Is there any principle in the *law of nations*, which upon the Act of cession or conquest, gives to the ceded or conquered country, a right to participate in the privileges of the Constitution of the parent country? The *usages* of nations from the period of Grecian colonization to the present moment, are precisely the reverse. Such a right never was asserted.

The Constitution was established by the people of the United States *for* the United States. It provides for the future admission of territories into the Union, and expressly confers upon Congress the power of governing them *as territories*, until they are admitted *as states*.

If the Constitution is in force in Florida, why is it not represented in Congress? Why was it necessary to pass an Act of Congress extending several of the laws of the United States to Florida? Why did Congress designate particular laws, such as the crimes Act, the slave trade and revenue Acts, and introduce them as laws into Florida? Why enumerate particular rights secured to the people of the United States, if the inhabitants of Florida were entitled to them upon the Act of cession?

It is denied, that *all* the cases of admiralty and maritime jurisdiction are exclusively vested in the Courts of the Union. On the contrary it is asserted, that many cases *within* the admiralty are also within the common law jurisdiction of the state Courts. Seamen's wages, salvage, marine *torts*, collision, &c. are of this description. 2 *Doug.* 614. *Abb. on Ship.* 433. 436. 3 *Bos. & Pul.* 612. 8 *East*, 57. 2 *Selw. N. P.* 1287. 1 *John.* 175. 1 *Nott & M'Cord*, 170. 18 *John.* 257. 2 *Gall.* 399. 1 *Kent's Commentaries*, 351–2.

If, however, salvage is admitted to be exclusively vested in

the Courts of the United States as a part of their admiralty jurisdiction, how does that deprive Congress of the power of distributing that jurisdiction among the Courts of the *territories* as it pleases? It is vested in the Courts of the Union; exclusive of the Courts of the *states*. The state Courts are constituted by state legislatures, over which Congress has no control. They are in a measure adverse jurisdictions. If it is admitted that Congress has no power to vest any part of admiralty jurisdiction in the state Courts, over which it has *no* control, how does it follow that it has no power to vest it in a territorial Court, over which it *has* control?

Congress can constitute new Courts within the states, and confer portions of admiralty jurisdiction upon them. It can confer that jurisdiction upon the superior or inferior Courts of the territory, or it can authorize the territorial legislature to do it. And this, whether the Constitution is or is not in force in Florida.

The power of Congress over the territory is the same in the one case as in the other. The Constitution authorizes Congress to *provide* for the government of the territories. It has all the power over them, that Congress and the legislature of a state, have over a state. Its power to appoint Courts of admiralty jurisdiction, can be as legally delegated, as its power to appoint any other Courts. All the Courts of Florida, whether appointed by Congress or by the territorial legislature, are *dependent* upon Congress, and are *Courts of the United States.* They are therefore, upon the admission of the opposite counsel, capable of receiving grants of admiralty jurisdiction. It is only *state* Courts, which are *independent* of Congress, that cannot be clothed with such power. If the power of Congress to distribute admiralty jurisdiction among the Courts of the territory as it pleases, is denied, its power to distribute it among the Courts of the United States as it pleases, must be denied. Of what consequence is it then, whether the Constitution is or is not in force in Florida, since the Constitution excludes the state Courts alone from the exercise of admiralty jurisdiction?

The ground assumed is this, that Congress authorized the territorial legislature "to legislate upon all rightful subjects of legislation," unless inconsistent with the Constitution. That salvage is a rightful, and in Florida a necessary subject of legislation; that the *necessary import* of the words of this grant includes the exercise of the power in question; that the exercise of that power, by enacting the wrecker's Act, was not inconsistent with the Constitution or laws of the United States; and that consequently it must be supported, unless it can be clearly shown that it is inconsistent with some other parts of the Act of Congress of March 1823.

This is attempted by resorting to the 8th section, which confers jurisdiction upon the Superior Courts of Florida. These Superior Courts were appointed by Congress, and jurisdiction was conferred by Congress, and the argument is that as Congress have conferred exclusive admiralty jurisdiction upon these Courts of its own appointment, that the power given to the legislature in the same Act to appoint other inferior Courts, and "to legislate upon all rightful subjects of legislation," was not intended to include the power over subjects of admiralty jurisdiction.

As the *necessary import* of the terms of the grant to the legislature does include the power in question, it must be shown that the *necessary import* of the grant of jurisdiction to the Superior Courts *excludes* it. Words of a clear import are not to be controlled by other words in the same statute, unless their import is equally clear; for doubtful words shall not limit the operation of clear and precise ones.

Two propositions must be established, as the necessary result of these words of the 8th section. 1st. That an *exclusive* admiralty jurisdiction is conferred upon the Superior Courts. 2nd. That that exclusive jurisdiction extends to *all cases.*

The words are the "same jurisdiction." And it is argued that because the jurisdiction of the Kentucky Court was exclusive, that these terms, *necessarily*, vest an exclusive jurisdiction in the Superior Courts.

The grant is "*the same jurisdiction.*" Must it *necessarily* be exclusive in Florida because it was exclusive in Kentucky? Are the terms, exclusive or concurrent, parts or qualities of the jurisdiction, so that a grant of the principle carries them along with it, as incidents? Or are they in fact no part of the jurisdiction itself, but terms used to express the *relation* which that Court has to some other Court? Is not the term exclusive intended to *prohibit* other Courts from exercising the same jurisdiction? Is a jurisdiction more extensive when exclusive, or less so when concurrent? Is it not precisely the same in the one case as in the other? The power of the Court over the parties, the subject matter and the process, is the same in the one case as in the other. A grant then of the "*same jurisdiction,*" does not *necessarily* carry with it the same relation to other jurisdictions. It may be concurrent in Kentucky, and exclusive in Florida. Suppose two Courts in Florida whose jurisdiction extended over the same district. Congress confers upon these two Courts the "same jurisdiction," that the Kentucky Court possessed. It was *exclusive* in Kentucky, but as it was conferred on two Courts, would it not be *concurrent* in Florida?

These terms, then, do not necessarily import an exclusive

jurisdiction, and ought not to limit the grant of power to the legislature. The intention of Congress might have been one way or the other. It is probable they did not intend an exclusive jurisdiction. In Kentucky this admiralty power is exclusive of the *state Courts*, over which Congress has no control. Why in Florida should it be exclusive of the territorial Courts over which Congress had a control.

The libellants then fail to establish the first proposition, that the *necessary import* of the terms confers an exclusive jurisdiction on the Superior Courts. The second proposition it is apprehended cannot be established, which is, that jurisdiction over *all cases*, to which the jurisdiction of the Kentucky Court extended, was intended to be conferred. The words of the Act are "all cases *arising under the laws* of the United States."

It is at once perceived, that unless it can be established that the case of salvage tried before the justice and jury was a case arising under the law of the United States, that Congress have not conferred jurisdiction over it, on the Superior Courts, and consequently that the territorial legislature had the right of conferring it upon an inferior Court.

The reasoning adopted to show, that it was a case arising under the laws of the United States is somewhat novel. The jurisdiction of the justice depended upon the territorial law; the right of the territorial legislation to enact that law depended on the Act of Congress; it was therefore a case arising under the laws of the United States. And the case of Osborne *vs.* the Bank of the United States, 9 *Wheat.* 738, is relied upon as an authority.

The case of Osborne *vs.* the Bank, did not involve the right of the bank to sue in a particular Court, not a mere question of jurisdiction, but the right of the bank to sue in *any Court*; its right to a *legal existence*. The fact of the legal existence of the bank depended on a law of the United States. The decision of the question settled the case between the parties. No suit could be afterwards brought by the bank in another Court. But, if the justice in Florida had decided against his own jurisdiction, it would have left the *rights* of the parties as they were before, to be decided upon in another Court. It would have effected the *remedy* in *that Court*, and that alone.

Besides, if every case which involves a question of jurisdiction under a law of the United States, is a case arising under the laws of the United States, then every case which by possibility can be brought in the Kentucky Court is of that description, because every case involves that question. What meaning then have the words "*arising under the laws of the United States?*" Why not omit them entirely and read the section thus, "the same jurisdiction *in all cases* which the Kentucky Court

has." If those words do not *limit* the grant to cases where some right is claimed under a law, they are wholly inoperative.

It will be found, not only that these words are inoperative upon the construction of the libellants, but that distinct and independent provisions in the Act of Congress of 1824, are also inoperative. Immediately following these words conferring jurisdiction upon the Superior Courts, it is provided that "all cases arising under the laws of the United States" shall be tried the first six days of the term, and all other cases afterwards; that in such cases the Clerk shall have the same fees that the Clerks of the District Courts have, but in all other cases, such fees as the legislature shall establish. Now if *every case* brought in a territorial Court, involves a question of the jurisdiction of the Court, and that alone gives it the character of "a case under the laws of the United States," according to the meaning of Congress, how can the distinction as to the time of trial, and the amount of fees exist? Congress has established *two* classes of cases, one under, and the other not under, the law of the United States. The libellants say there is but *one* class. All cases brought in the Courts of Florida are cases arising under the laws of the United States, because they all involve a question of jurisdiction. This view of the subject appears conclusive.

The whole case results in this, that Congress, being the sovereign, *de facto*, or under the Constitution of Florida, had a right to provide for its government by a direct or a delegated exercise of power, or by both. That it had the right of distributing all branches of judicial power among the several Courts of Florida as it pleased, and how it pleased, and this to the same extent if the Constitution is, or if it is not, *per se*, in force in Florida.

That the grant of power to the territorial legislature clearly embraces the exercise of it in question, and that so far from a clear grant of *exclusive* jurisdiction in *all* admiralty cases, being conferred upon the Superior Courts, which could alone limit the grant of power to the legislature, that it is very doubtful whether any exclusive jurisdiction was intended, and if it was, it was only in relation to cases in which some right or power is claimed under a law of the United States. It is agreed that salvage is not of that description, unless the possibility of a question of jurisdiction makes it so.

Mr. Webster—

This will be a hard case against the claimant of the property, should he lose it, having purchased it in good faith under the decree of a Court exercising jurisdiction over the matter, and to which jurisdiction, no objection was made, by the parties to the proceeding.

(The American Insurance Company et al. vs. Canter.)

How did the District Court of South Carolina obtain jurisdiction in this case? No wrong was done—no tort was committed. That Court had not therefore jurisdiction of the subject. Salvage is too indefinite a term, to designate jurisdiction. Marine salvage, when the service has been rendered at sea, may form a proceeding in the admiralty, but in this case, the services were after the vessel was a wreck; and therefore the same principles do not apply.

This proceeding is in the nature of an action of trespass; the process was against the *res*, and the *person* of the claimant; and because there had been a question of salvage in the Court under whose decree the *res* is held by the claimant, it does not follow, that there is jurisdiction in the Courts of the United States. It is said the property has not passed by any valid decree, and trespass or trover would lie.

Has there been such a judicial sale, as conveyed the property to the claimant?—If not, the insurance companies claim to hold the property. What is Florida? It is no part of the United States. How can it be?—how is it represented? do the laws of the United States reach Florida? Not unless by particular provisions.

The territory and all within it, are to be governed by the acquiring power, except where there are reservations by treaty.

By the law of England, when possession is taken of territories, the king, *Jure Coronæ*, has the power of legislation until parliament shall interfere. Congress have the *Jus Coronæ* in this case, and Florida was to be governed by Congress as she thought proper.

What has Congress done? she might have done any thing—she might have refused the trial by jury, and refused a legislature. She has given a legislature, to be exercised at her will; and a government of a mixed nature, in which she has endeavoured to distinguish between state and United States jurisdiction, anticipating the future erection of the territory into a state.

Does the law establishing the Court at Key West, come within the restrictions of the Constitution of the United States? If the Constitution does not extend over this territory, the law cannot be inconsistent with the national Constitution.

It is said that the Court erected for the territory by the law of the United States, has exclusive jurisdiction over this case, and that the interference of the local legislature is unauthorized. Does the law erecting the Superior Court of Florida, give this exclusive jurisdiction?

The jurisdiction given to the Florida Court is the same as that given to the Circuit Court of Kentucky; and as the District Court of Kentucky has jurisdiction of all cases arising un-

der the laws of the United States, it is inferred, that the same is vested in the Florida Court. But it does not follow from the language of the Act, that the jurisdiction is exclusive; and thus the power of the Court erected by the legislature of Florida, may be and was concurrent. The main point in this case is, whether it is a case arising under the Constitution of the United States? What are the cases which are referred to in the provision, and is this one?

The principles of those cases have been examined, and enough has been settled, to show that this is one which does not so arise. A case is not one arising under a law of the United States, because, in some part of it, a question may arise under a law of the United States. The meaning of the provision of the Constitution cannot be, that when a law of the United States can have any influence in a case, it is to be considered as one arising under the law of the United States.

How does the cause before the Court arise under a law of the United States? It is a claim for salvage. The goods are brought into Key West, and there is no law of the United States limiting or fixing the amount of salvage. Salvage is not a right arising under a law of the United States—it is a common law right; and the action for its recovery, or the rate to be allowed, does not depend upon any law of the United States. It cannot be claimed, that any laws operated in the case, unless the general laws which extended over the territory. The case of Osborn *vs.* the Bank of the United States, decided in this Court, does not apply to this case. The law giving to the bank their charter, gave to that institution a power to sue in the Courts of the United States. But, as has been stated, the salvors of the cotton, did not claim salvage under any law of the Union. The salvage might have been sued for, wherever the goods could be found and libelled, in England or in France, or elsewhere.

The argument, that this Court should lay its hands on the proceedings of the Courts of Key West, because of the great injuries sustained by merchants and underwriters, if it could, at any time, have force here, cannot have it now; as the law establishing the Court which is so much complained of has been repealed.

Mr. Ogden in reply.

The place where the service is done, ascertains the jurisdiction. It is upon this principle, that questions of seamen's wages are subjects of admiralty jurisdiction, and entertained in Admiralty Courts; and upon this principle, the case before the Court, is of admiralty cognizance. The whole of the services of the salvors were at sea; the place where the Point a Petre was wrecked, was at a distance from the main land, and there the goods were saved.

(The American Insurance Company et al. vs. Canter.)

It is admitted, that for the cotton, which is the subject of this suit, an action of trover will lie; but this is a concurrent remedy with that afforded in a Court of Admiralty.

Territories acquired by conquest, and by cession, stand under different relations to the United States. Where territories are ceded, they become part of the United States. It has been the uniform understanding, that this shall be the case. Those territories obtained by treaties with France and Spain, were so considered, and the provisions in those treaties relative to the rights and privileges of the inhabitants, were introduced under the belief that Congress would not interfere.

The Act relative to the terrritory of Florida provides, that no law shall be passed against the provisions of the Constitution of the United States. The officers appointed under it, take an oath to support the Constitution, and thus the full force and operation of the Constitution is acknowledged in the territory.

By the Constitution, the Courts of the United States have jurisdiction in all cases of admiralty and maritime jurisdiction; and it therefore follows, that this is exclusive. What Courts have Congress ordained and established in the territory of Florida, to exercise the jurisdiction assigned by the Constitution to the Courts of the United States? The law establishes a Superior Court with general jurisdiction, similar to the Courts established in the states; it then provides that inferior Courts may be erected by the territorial legislature, whose jurisdiction shall not exceed *one hundred dollars;* and it is afterwards said in the law, that the Superior Court shall, in addition to the defined powers, exercise all such powers as are granted to the United States Court of Kentucky. The Court established in Kentucky has given to it admiralty and maritime jurisdiction, and therefore the Superior Court of Florida has the same jurisdiction. If, then, it is given by Congress to the Superior Court, it exists nowhere else.

It is said that Congress has given to the territorial legislature all the rights of legislation they have. Legislative powers cannot be delegated. *Delegatus non potest delegare.*

Whether the territorial Court had jurisdiction, is a question arising under the Constitution of the United States. How else does it arise? Suppose a jurisdiction in admiralty cases, assumed by New-York during a war. How can the powers thus assumed be examined before the Courts of the United States, but by affirming the Acts to be void by the Constitution and laws of the United States?

This is a question of salvage; and had the territorial Court jurisdiction of salvage? If the cotton was not sold under the decree of a Court competent to decide such a question, the

property is not changed. Does the territorial Act give the jurisdiction? The powers of Courts formed under the territorial law, being limited to controversies not exceeding one hundred dollars, the limitation has been exceeded; and the provisions for the establishment of the Court are therefore void.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

The plaintiffs filed their libel in this cause in the District Court of South Carolina, to obtain restitution of 356 bales of cotton, part of the cargo of the ship Point a Petre; which had been insured by them on a voyage from New-Orleans to Havre de Grace, in France. The Point a Petre was wrecked on the coast of Florida, the cargo saved by the inhabitants, and carried into Key West, where it was sold for the purpose of satisfying the salvors; by virtue of a decree of a Court, consisting of a notary and five jurors, which was erected by an Act of the territorial legislature of Florida. The owners abandoned to the underwriters, who having accepted the same, proceeded against the property; alleging that the sale was not made by order of a Court competent to change the property.

David Canter claimed the cotton as a *bona fide* purchaser, under the decree of a competent Court, which awarded seventy-six per cent. to the salvors, on the value of the property saved.

The District Judge pronounced the decree of the territorial Court a nullity, and awarded restitution to the libellants of such part of the cargo as he supposed to be identified by the evidence; deducting therefrom a salvage of fifty per cent.

The libellants and claimant both appealed. The Circuit Court reversed the decree of the District Court, and decreed the whole cotton to the claimant, with costs; on the ground that the proceedings of the Court at Key West were legal, and transferred the property to the purchaser.

From this decree the libellants have appealed to this Court.

The cause depends, mainly, on the question whether the property in the cargo saved, was changed by the sale at Key West. The conformity of that sale to the order under which it was made, has not been controverted. Its validity has been denied, on the ground that it was ordered by an incompetent tribunal.

The tribunal was constituted by an Act of the territorial legislature of Florida, passed on the 4th July 1823, which is inserted in the record. That Act purports to give the power which has been exercised; consequently the sale is valid, if the territorial legislature was competent to enact the law.

The course which the argument has taken, will require, that,

in deciding this question, the Court should take into view the relation in which Florida stands to the United States.

The Constitution confers absolutely on the government of the Union, the powers of making war, and of making treaties; consequently, that government possesses the power of acquiring territory, either by conquest or by treaty.

The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by the treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them, and the government which has acquired their territory. The same Act which transfers their country, transfers the allegiance of those who remain in it; and the law, which may be denominated political, is necessarily changed, although that which regulates the intercourse, and general conduct of individuals, remains in force, until altered by the newly created power of the state.

On the 2d of February 1819, Spain ceded Florida to the United States. The 6th article of the treaty of cession, contains the following provision—"The inhabitants of the territories, which his Catholic majesty cedes to the United States by this treaty, shall be incorporated in the Union of the United States, as soon as may be consistent with the principles of the federal Constitution; and admitted to the enjoyment of the privileges, rights, and immunities of the citizens of the United States."

This treaty is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities, of the citizens of the United States. It is unnecessary to inquire, whether this is not their condition, independent of stipulation. They do not, however, participate in political power; they do not share in the government, till Florida shall become a state. In the mean time, Florida continues to be a territory of the United States; governed by virtue of that clause in the Constitution, which empowers Congress "to make all needful rules and regulations, respecting the territory, or other property belonging to the United States."

Perhaps the power of governing a territory belonging to the United States, which has not, by becoming a state, acquired the means of self-government, may result necessarily from the facts, that it is not within the jurisdiction of any particular state, and is within the power and jurisdiction of the United

States. The right to govern, may be the inevitable consequence of the right to acquire territory. Whichever may be the source, whence the power is derived, the possession of it is unquestioned. In execution of it, Congress, in 1822, passed "an Act for the establishment of a territorial government in Florida;" and, on the 3d of March 1823, passed another Act to amend the Act of 1822. Under this Act, the territorial legislature enacted the law now under consideration.

The 5th section of the Act of 1823, creates a territorial legislature, which shall have legislative powers over all rightful objects of legislation; but no law shall be valid, which is inconsistent with the laws and Constitution of the United States.

The 7th section enacts "That the judicial power shall be vested in two Superior Courts, and in such inferior Courts, and justices of the peace, as the legislative council of the territory may from time to time establish." After prescribing the place of cession, and the jurisdictional limits of each Court, the Act proceeds to say; "within its limits herein described, each Court shall have jurisdiction in all criminal cases, and exclusive jurisdiction in all capital offences; and original jurisdiction in all civil cases of the value of one hundred dollars, arising under and cognizable by the laws of the territory, now in force therein, or which may, at any time, be enacted by the legislative council thereof."

The 8th section enacts "That each of the said Superior Courts shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States, which, by an Act to establish the judicial Courts of the United States, approved the 24th of September 1789, and an Act in addition to the Act, entitled an Act to establish the judicial Courts of the United States, approved the 2d of March 1793, was vested in the Court of Kentucky district."

The powers of the territorial legislature extend to all rightful objects of legislation, subject to the restriction, that their laws shall not be "inconsistent with the laws and Constitution of the United States." As salvage is admitted to come within this description, the Act is valid, unless it can be brought within the restriction.

The counsel for the libellants contend, that it is inconsistent with both the law and the Constitution; that it is inconsistent with the provisions of the law, by which the territorial government was created, and with the amendatory Act of March 1823. It vests, they say, in an inferior tribunal, a jurisdiction, which is, by those Acts, vested exclusively in the Superior Courts of the territory.

(The American Insurance Company et al. vs. Canter.)

This argument requires an attentive consideration of the sections which define the jurisdiction of the Superior Courts.

The 7th section of the Act of 1823, vests the whole judicial power of the territory "in two Superior Courts, and in such inferior Courts, and justices of the peace, as the legislative council of the territory may from time to time establish." This general grant is common to the superior and inferior Courts, and their jurisdiction is concurrent, except so far as it may be made exclusive in either, by other provisions of the statute. The jurisdiction of the Superior Courts, is declared to be exclusive over capital offences; on every other question over which those Courts may take cognizance by virtue of this section, concurrent jurisdiction may be given to the inferior Courts. Among these subjects, are "all civil cases arising under and cognizable by the laws of the territory, now in force therein, or which may at any time be enacted by the legislative council thereof."

It has been already stated, that all the laws which were in force in Florida while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force, until altered by the government of the United States. Congress recognises this principle, by using the words "laws of the territory now in force therein." No laws could then have been in force, but those enacted by the Spanish government. If among these, a law existed on the subject of salvage, said it is scarcely possible there should not have been such a law, jurisdiction over cases arising under it, was conferred on the Superior Courts, but that jurisdiction was not exclusive. A territorial Act, conferring jurisdiction over the same cases on an inferior Court, would not have been inconsistent with this section.

The 8th section extends the jurisdiction of the Superior Courts, in terms which admit of more doubt. The words are "That each of the said Superior Courts, shall moreover have and exercise the same jurisdiction, within its limits, in all cases arising under the laws and Constitution of the United States, which, by an Act to establish the judicial Courts of the United States, was vested in the Court of the Kentucky district."

The 11th section of the Act declares "That the laws of the United States, relating to the revenue and its collection, and all other public Acts of the United States, not inconsistent or repugnant to this Act, shall extend to, and have full force and effect, in the territory aforesaid."

The laws which are extended to the territory by this section, were either for the punishment of crime, or for civil

purposes. Jurisdiction is given in all criminal cases, by the 7th section, but in civil cases, that section gives jurisdiction only in those which arise under and are cognizable by the laws of the territory; consequently, all civil cases arising under the laws which are extended to the territory by the 11th section, are cognizable in the territorial Courts, by virtue of the 8th section; and, in those cases, the Superior Courts may exercise the same jurisdiction, as is exercised by the Court for the Kentucky district.

The question suggested by this view of the subject, on which the case under consideration must depend, is this:—

Is the admiralty jurisdiction of the District Courts of the United States vested in the Superior Courts of Florida under the words of the 8th section, declaring that each of the said Courts "shall moreover have and exercise the same jurisdiction within its limits, in all cases arising under the laws and Constitution of the United States," which was vested in the Courts of the Kentucky district?

It is observable, that this clause does not confer on the territorial Courts all the jurisdiction which is vested in the Court of the Kentucky district, but that part of it only which applies to "cases arising under the laws and Constitution of the United States." Is a case of admiralty of this description?

The Constitution and laws of the United States, give jurisdiction to the District Courts over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. We are therefore to inquire, whether cases in admiralty, and cases arising under the laws and Constitution of the United States, are identical.

If we have recourse to that pure fountain from which all the jurisdiction of the Federal Courts is derived, we find language employed which cannot well be misunderstood. The Constitution declares, that "the judicial power shall extend to all cases in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, or other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction."

The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases

are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise. It is not then to the 8th section of the territorial law, that we are to look for the grant of admiralty and maritime jurisdiction, to the territorial Courts. Consequently, if that jurisdiction is exclusive, it is not made so by the reference to the District Court of Kentucky.

It has been contended, that by the Constitution the judicial power of the United States extends to all cases of admiralty and maritime jurisdiction; and that the whole of this judicial power must be vested "in one Supreme Court, and in such inferior Courts as Congress shall from time to time ordain and establish." Hence it has been argued, that Congress cannot vest admiralty jurisdiction in Courts created by the territorial legislature.

We have only to pursue this subject one step further, to perceive that this provision of the Constitution does not apply to it. The next sentence declares, that "the Judges both of the Supreme and inferior Courts, shall hold their offices during good behaviour." The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not constitutional Courts, in which the judicial power conferred by the Constitution on the general government, can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations, respecting the territory belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power which is defined in the 3d article of the Constitution, but is conferred by Congress, in the execution of those general powers which that body possesses over the territories of the United States. Although admiralty jurisdiction can be exercised in the states in those Courts, only, which are established in pursuance of the 3d article of the Constitution; the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general, and of a state government.

We think, then, that the Act of the territorial legislature, erecting the Court by whose decree the cargo of the Point a Petre was sold, is not "inconsistent with the laws and Constitution of the United States," and is valid. Consequently, the sale made in pursuance of it changed the property, and the decree of the Circuit Court, awarding restitution of the property to the claimant, ought to be affirmed with costs.

THE UNITED STATES vs. 422 CASKS OF WINE, HAZARD & WILLIAMS CLAIMANTS.

It is not the habit of this Court, to consider points again open for discussion, which have been once deliberately decided, and have furnished the ground work of the judgment already rendered in the same cause, in a former stage of its proceedings. {549}

In suits *in rem*, and in the exchequer side of the District Courts of the United States, the claimant is an actor, and is entitled to come before the Court in that character only, in virtue of his proprietary interest in the thing in controversy. This alone gives him a *persona standi in judicio*. It is necessary that he should establish his right to that character, as a preliminary to his admission as a party *ad litem*, capable of sustaining the litigation. {549}

If the claim be made through an agent, the agent must make oath as to his belief of the verity of the claim, and if necessary produce proof of his authority, before he can be admitted to put in the claim. {549}

Allegations and pleadings to the merits are a waiver of the preliminary inquiry as to proprietary interest; and admission that the party is rightly in Court and capable of contesting the merits. {550}

If after proceeding in a cause the Court find the claimant has no property, or that it is in another not represented, the Court will retain the *res*, until the real owner shall appear, claim and receive it from the Court. {550}

Upon a writ of error in an exchequer proceeding, which has been tried by a jury, the evidence given at the time of the trial is not in a strict sense before this Court. {550}

ERROR to the District Court of E. Louisiana.

This case was before this Court, at February Term 1823, and is reported in 8 *Wheat.* 391, under the name of the Sarah. The cause having been sent back, the libel was changed into an information, charging the seizure to have been made on land, according to the leave given by the decree of the Court in that case.

The information charges the wine to have been in reality Malaga wine, falsely exported from New-York under the name of Sherry, for the benefit of the drawback. To this information, a claim and answer was given and filed by Benjamin Story, as agent for Hazard & Williams, and on the oath of the said Story, claiming the wine as the property of the said Hazard & Williams, making no answer to the specific fact charged by the information, that the wine was Malaga wine, exported under the name of Sherry for the benefit of drawback; but denying generally the allegations of the information, or that any thing had been done to forfeit the wine under the revenue laws of the United States, and claiming the restoration of the wine to Hazard & Williams. The record set forth the evidence on the

question, whether the wines were Malaga or Sherry. The verdict of the jury was for the claimants. The District Attorney moved for a new trial, which was overruled; on which he brought this writ of error, and made the following assignment of errors.

1. That on the 18th of December 1819, this case was tried by jury, and verdict and judgment rendered for the United States.

2. The proceedings under this libel were regular; as the amendment related to matter of form merely, and not of substance; and by the 17th section of the Act of Congress of 24th September 1789, the Courts of the United States may establish all necessary rules for conducting the business of the Court; and the 22d section of the same Act provides that "there shall be no reversal for error in ruling any plea in abatement," &c. The proceedings in this case, were in conformity with the rules of the Court in which they were instituted.

No answer and claim was filed and sworn to by or in the name and behalf of Charles Hall, the real owner of the said 422 casks of wine, at the time of the seizure and forfeiture thereof to the United States.

Mr. Wirt, Attorney General, on the part of the United States, submitted the case, on the errors assigned by the District Attorney.

Mr. Ogden and Mr. Hall, on the part of the claimants, made the following points:—

1. That there is no error upon the record, for the causes assigned by the Attorney for the United States; the same points having been already before this Court, and after due consideration, conclusively settled, upon the first trial of this cause. (See 8 *Wheat.* 391. "The Sarah.")

2. That there was no necessity for the said Charles Hall to file a claim and answer in *his own name*, since his title to said wine, (if proved) accrued after the seizure thereof; and after a claim and answer had been duly filed by Hazard & Williams, the parties having the *legal* title to said property.

3. That the objection "that no answer and claim hath been filed and sworn to by or in the name and behalf of Charles Hall, the real owner of said 422 casks of wine," *were it valid*, cannot *now* prevail; because the same should have been taken when the claim was filed, or at all events at the time of the trial of the cause in the Court below.

4. That from the whole record it appears, that judgment ought not to be for the United States of condemnation of said wine; but ought, of right, to be for the claimants.

5. "That from the whole of the evidence apparent upon the record, and taken for the purpose of review, &c." it is manifest that restitution of said wine ought to be decreed to the claimants.

(The United States vs. 422 Casks of Wine.)

Mr. Justice STORY delivered the opinion of the Court.—

This is the same cause which came before this Court at February term, 1823, and is reported in 8 *Wheat.* 391. The cause having been remanded to the District Court of Louisiana for farther proceedings, the libel or information was there amended, so as to become, technically, an exchequer information of seizure; and the parties being at issue upon the question of forfeiture, the jury returned a verdict for the claimants, upon which judgment was rendered in their favour. Upon the writ of error now brought up on this last judgment, two grounds for reversal have been asserted in the assignment of errors spread upon the record, and the Attorney General has now submitted them, after a brief exposition, to the consideration of the Court.

The first is in substance the same question which was decided by this Court, upon the former appeal, and is presented in the shape of a re-argument by the District Attorney. Upon this it is unnecessary to say more, than that we adhere to the opinion formerly expressed, and can perceive no reason for changing it. It is not the habit of this Court to consider points again open for discussion, which have been once deliberately decided, and have furnished the ground work of the judgment already rendered in the same cause, in a former stage of its presentation here.

The second ground is, that Messrs. Hazard & Williams, in whose behalf the claim in this case was interposed, are not the real owners of the wine under seizure, but the same was owned by one Charles Hall; so that the claimants are not entitled to any judgment of restitution.

This objection is founded upon a mistaken view of the time, nature and order of the proceedings proper in suits *in rem*, whether arising on the admiralty or exchequer side of the Court. In such suits, the claimant is an actor, and is entitled to come before the Court in that character only, in virtue of his proprietary interest in the thing in controversy; this alone gives him a *persona standi in judicio.* It is necessary that he should establish his right to that character, as a preliminary to his admission as a party, *ad litem*, capable of sustaining the litigation. He is therefore, in the regular and proper course of practice, required in the first instance, to put in his claim, upon oath, averring in positive terms his proprietary interest. If he refuses so to do, it is a sufficient reason for a rejection of his claim. If the claim be made through the intervention of an agent, the agent is in like manner required to make oath to his belief of the verity of the claim; and if necessary, he may also be required to produce and prove his authority, before he

can be admitted to put in the claim. If this is not done, it furnishes matter of exception, and may be insisted upon by the adverse party, for the dismissal of the claim. If the claim be admitted upon this preliminary proof, it is still open to contestation, and, by a suitable exceptive allegation in the admiralty, or, by a correspondent plea in the nature of a plea in abatement, to the person of the claimant, in the exchequer, the facts of proprietary interest, sufficient to support the claim, may be put in contestation, and formally decided. It is in this stage of the proceedings, and in this only, that the question of the claimant's right is generally open for discussion. If the claim is admitted without objection, and allegations or pleadings to the merits are subsequently put in; it is a waiver of the preliminary inquiry, and an admission that the party is rightly in Court, and capable of contesting the merits. If indeed, it should afterwards appear, upon the trial, even after the merits have been disposed of in favour of the claimants, that the claimant had, in reality, no title to the property; but that the same was the property of a third person, who was not represented by the claimant, or had an adverse interest, or whose rights had been defrauded, it might still be the duty of the Court to retain the property in its own custody, until the true owner might have an opporiunity to interpose a claim, and receive it from the Court. But such cases can rarely occur; and are applications to the discretion of the Court, for the furtherance of justice; and, in no shape matters, which the original *promovent* could have a right to require at its hands.

From this review of the practice, as to claims in proceedings *in rem*, it is obvious that the objection now relied on, however apparent it might be from the evidence disclosed upon the record, could not be insisted on as matter of error. In a strict sense, however, this being a writ of error upon an exchequer information tried by a jury, the evidence given at the trial is not properly before us; and as a common law proceeding, the affidavit of Mr. Henner constitutes no part of the record. But, even if that affidavit were admissible, and the objection were now open, it is by no means clear, that it would be available. The property was by the consent of Hall sold and conveyed to Messrs. Hazard & Williams, in trust for himself. If that conveyance was fraudulent as to creditors, it was not absolutely void, and only voidable by them. And, at all events, we cannot but see that they had full authority to interpose this claim, by the consent of the real owner; and the irregularity, if any, prejudices no adverse right, and interferes with no rule of justice.

The judgment of the District Court must therefore be affirmed. But a certificate of probable cause of seizure will be

granted, as such probable cause is not denied to exist, and indeed is apparent from the verdict of the first jury.

This cause came on, &c. on consideration whereof, It is considered and adjudged by this Court, that there is no error in the judgment of the said District Court of Louisiana in the premises, and that the same be and hereby is affirmed. And it is further ordered and adjudged, that there was a reasonable cause of seizure of the wines, and promises set forth, in the information, and that a certificate thereof be entered of record accordingly; and that the cause be remanded with directions to the District Court of Louisiana to make restitution to the claimants, and otherwise proceed in the premises, according to law.

ROBERT STEELE'S LESSEE, PLAINTIFF IN ERROR, *vs.* JESSE SPENCER AND OTHERS, DEFENDANTS IN ERROR.

A decree of the Supreme Court of Ohio ordered that the patentee of a certain tract of land, should, within six months, make a deed, &c. with covenants of warranty conveying a portion of the land held under a patent to the complainants in that suit, and on the failure of A to make the said deed, &c. "that then and in that case, the complainant shall hold possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him." The decree of the Supreme Court of Ohio by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed as would have been vested by a deed of equal date; and the registry Act of Ohio applies as well to a title under such a decree, as it would do, if the party held under a *bona fide* deed of the same date with the patent of the land, and the decree gives a legal title as ample as a deed. {558}

The registry Act of Ohio directs that all deeds made within the state shall be recorded within six months from the time of the actual execution thereof, and declares, that if any such deed shall not be recorded in the County where the land lies, within the limits allowed by the law, "the same shall be deemed fraudulent and void, against any subsequent purchaser for a valuable consideration without notice of such deed. {559}

In the construction of the registry Act of Ohio, the term "purchasers," is usually taken in its limited legal sense. It means a complete purchaser; or in other words, a purchaser clothed with a legal title. {559}

It is not necessary that a deed made to a subsequent *bona fide* purchaser without notice shall be recorded to give it operation against a prior unrecorded deed, as by the provisions of the registry Acts the prior deed is declared in itself absolutely void as against such purchaser. {560}

Whether erasures and alterations in a deed are material or not, is a question of law to be decided by the Court. {560}

The construction of words belongs to the Court, and the materiality of an alteration in a deed, is a question of construction. {561}

THIS was a writ of error to the Circuit Court of the United States for the district of Ohio, to reverse the judgment of that Court in favour of the defendant in error, in an action of ejectment instituted by the plaintiff in error, to recover a tract of land in Perry county, in the state of Ohio.

The title claimed and exhibited by the plaintiff in the ejectment, was originally derived under a patent from the United States to *Jesse Spencer*, dated November 15th 1811; who with George Spencer and others, were the heirs at law of Thomas Spencer deceased; and in order to show the title acquired by the patent, he offered in evidence a deed from Jesse Spencer, the patentee, and Catharine his wife, to William Steele, pur-

porting to bear date the 20th of January 1818; and which appeared on that day by the certificate on the deed, to have been acknowledged before a justice of the peace. "William Fulton, one of the subscribing witnesses, proved, that he attested the deed in the office of Jesse Spencer, but could not state when; that William Steele was not present; that he knew nothing of the purchase of the land by William Steele from Jesse Spencer; and that he saw no more of the deed, until about one year ago, when Spencer and Steele were together, and Spencer produced the deed to see if the witness would recognise his signature." Wherever the name of William Steele appeared, either in the body of the deed, or the label thereon, it manifestly appeared to have been written on an erasure, and with ink of a different colour, as did the words "Ross" and "Ohio," in describing the place of residence of said Steele. The alterations on the face of the deed were not accounted for by any testimony. This deed was not recorded in the county where the land lies, or elsewhere. The plaintiff further offered in evidence, a deed from William Steele, and Sarah his wife, to Robert Steele the lessor of the plaintiff, bearing date the 7th of July A. D. 1821. Also, the deposition of John Daragh, to prove the execution of said deed; which deed and the certificate and acknowledgment thereon, and also the deposition of John Daragh, were also not recorded.

The defendants in the ejectment were in possession of the land, and they claimed to hold it under a decree of the Supreme Court of the state of Ohio, for Ross county, sitting in Chancery, rendered on the 3d of January 1820, in a proceeding by a bill filed in Perry county, and, under advisement in Ross county, by the heirs of Thomas Spencer, deceased, against Jesse Spencer and others, by which decree Jesse Spencer was ordered to convey the land in controversy, to certain of the parties in the said bill, upon their full compliance with the terms and conditions stated in the said decree. The decree also proceeds as follows: "It is further ordered and decreed, that if the complainants shall within the time specified, deposit and pay to the clerk of Perry county aforesaid, the several sums of money aforesaid, and interest thereon, as aforesaid, and the defendant, Jesse Spencer, shall fail to make out, execute and deliver to said clerk, a deed for nine-tenths of the land aforesaid, within the times aforesaid, in manner aforesaid, that then and in that case, the heirs at law aforesaid, to whom the land aforesaid is decreed to be conveyed, in manner aforesaid, shall hold, possess and enjoy, nine-tenths of the half section aforesaid, to them, their heirs, and assigns for ever, in as full and ample a manner as though the same were conveyed to them by the said Jesse Spencer, defendant, in manner aforesaid." "It is further ordered, that Jesse Spencer,

the defendant, pay the costs of the suit in seven months from the date of this decree; and if he fail so to do, that then execution or executions issue in the same manner as executions issue on judgments at law. It is further ordered and decreed, that the bill as to the other two defendants, to wit, William Spencer and James Spencer, is dismissed without costs, and that the clerk of the Supreme Court for Ross county, enter this decree of record in the said Supreme Court of Ross county, and that he transmit a copy of this decree to the clerk of the Supreme Court of Perry county, it being in the same county from which this cause was removed here for decision, and that the same be entered of record in the Supreme Court of the said county of Perry, in the same manner as if the cause had been there heard and decreed. It is further ordered and decreed, that if the money is not paid and deposited in manner aforesaid, and within the time aforesaid, that then these complainants shall pay all the costs of the suit."

The defendants also exhibited evidence of their having fully complied with all the requisites of the said decree, by the payment of the sum of 524 dollars, the amount decreed to be paid; and also that the decree was duly recorded in the proper office for recording of deeds of the county of Perry, on the 24th July 1822.

After the evidence was closed, the Court, on the motion of the counsel for the defendants, instructed the jury as follows:—

1. That the decree of the Supreme Court of the state of Ohio, given in evidence in this cause by the defendants, vested in them such a legal title to the land in question, as would have been conveyed by deed of equal date from Jesse Spencer, the patentee, and that the registry Act of Ohio, applies as well to the title of the defendants under the said decree, as it would do if they held under a *bona fide* deed, of the same date from the said patentee.

2. That if the elder deed be not recorded within the time specified by the registry Act of Ohio, it is wholly void, as to subsequent *bona fide* purchasers, without notice of the existence of such deed.

3. That if the deed from Jesse Spencer to William Steele, was altered in a material part, after it was sealed, attested, and acknowledged, such alterations absolutely avoid the deed, and it can convey no title to the lessor of the plaintiff. The counsel of the defendant objected to those parts of the instructions contained in the first and second specifications. They submitted to this Court the following points:—

1. The Court below erred in charging the jury, that the registry Act of Ohio applies as well to the title of the defend-

ants, under the decree set forth in the bill of exceptions, as if they held under a *bona fide* deed of the same date.

2. The Court below erred in charging the jury, that if the deed from Jesse Spencer to William Steele, was altered in a material part, after it was sealed, attested, and acknowledged; such alteration absolutely avoids the deed, and it can convey no title to the lessor of the plaintiff. Because—

1. Such an alteration, if made without the consent of the grantee, would not avoid the deed, and divest the estate vested by the execution of the deed in the grantee.

2. An alteration of the deed made with the consent of the grantee, could not divest the estate conveyed by the deed, and revest the same in the grantor.

The case was argued by Mr. Leonard, for the plaintiff in error, and by Mr. Ewing, for the defendants.

For the plaintiff, it was insisted, that the registry Act of Ohio applies exclusively to purchasers by deed, and does not include and protect those who hold in virtue of decrees in chancery. Under the statute regulating proceedings in chancery, a suit may be instituted to obtain a conveyance either in the county in which the land is situated, or where the defendant may be found.

The action and the counts in the declaration, are *in rem vel personam*, and jurisdiction is acquired by the possession and control of the subject matter, or of the person. As the registry Act does not require decrees made in the Courts of one county to be recorded in the county where the land is situate, neither does it extend its protection to purchasers under such decrees —or if it embraces other purchasers than those by deed, it protects all *subsequent* purchasers, and *subsequent* purchasers alone.

Those cannot be considered *subsequent* purchasers, who were before the execution of unrecorded deeds vested with equitable titles, which afterwards were enforced by suits in chancery. Such purchasers by decree, do not come within the mischief of the registry Act. Such a construction would be forced, and inconvenient; as the purchaser by deed, on recording his deed, or by giving notice, *pendente lite*, in *chancery*; and even after decree rendered, and before the expiration of the time limited for the execution of the conveyance, although after the lapse of six months; would bring his deed within the protection of the Act, and defeat purchasers by decree. If the chancery suit had been instituted against Steele, as well as Spencer, the complainants could not have obtained a decree. A party might in this way obtain a good title, by his omission to embrace proper parties in his bill in equity. A defective title might thus be made good during the progress of the suit, and indeed a

title invalid at the rendition of the decree, valid in a month after—*vires acquirit eundo.*

This construction would make the statute penal; punishing the party for his *laches*, in omitting to record his deed, instead of simply a protection of the rights of others. All the mischief to be guarded against by the statute, was effected by the execution of the deed; and the omission, seasonably to record the deed, could not injure one who had a good equitable title, which is subsequently enforced by a bill in equity.

It was also insisted, that the Court erred in charging the jury, that a material alteration in the deed from Spencer to Steele, after its execution, could defeat the title thereby vested in Steele. It was apparent, on the plaintiff's bill of exceptions, the Court erred in thus charging the jury, and the Court could not look to the bill of exceptions of the defendants in error for any purpose; or if they could, the error was not rectified by a comparison of the facts there stated with the charge. Cited, Marshal *vs.* Fisk, 6 *Mass. Rep.* 32.

Mr. Ewing for the defendants.—

The registry Act of Ohio, protects subsequent *bona fide* purchasers against unregistered deeds. A party entitled under a decree of a Court of Chancery, is a purchaser, in the legal signification of the term, and is therefore within the letter of the statute. There can be no reason to except him from its operation. He is as much injured by the concealment of a prior deed, as any other purchaser. Whenever a party is entitled in equity, to a specific performance of a contract; if the defendant had put it out of his power to perform it, it is important that the fact should be made known to the party interested, that he may seek other and more effectual relief. A purchaser under such a decree, is therefore within the spirit as well as the letter of the Act.

The Court did not err in charging the jury that the defendant's title took effect from the date of the decree.

Courts of Equity in Ohio, in settling the title to real property, proceed, *in rem*, not *in personam*. It is true, they direct the party to execute a deed, but they do not compel him by attachment, to do so. If he refuses, the decree operates as a deed, and the *res sita* gives jurisdiction to the Court. The decree of the Court fixes the title to the property. The time allowed for the conveyance, relates merely to the transfer of the evidences of title, and the possession, and the deed, if made pursuant to the decree, relate to the date of the decree itself. If no deed be made, the title by the decree relates. Thus, if the party against whom a decree is rendered should die, or being a *feme sole*, should marry before the period fixed for the

execution of a title; it is believed that the decree would operate without further proceeding to vest the title.

2. Deeds for the conveyance of real estate in Ohio, derive their validity solely from statutory provisions. No Common Law mode of transferring real estate, (except by operation of law,) is recognised. Linley *vs.* Coates, 1 *Ham. Rep.*

Neither is the statute of uses, which in England gives validity to the deed of bargain and sale, in force in Ohio. Deeds therefore to be valid, must be executed according to the provisions of the statute of that state; and if they are deficient in any of the requisites pointed out by that statute, they create no legal title.

That Act, (22 *vol. Ohio Laws, p.* 218,) requires the grantor to seal and acknowledge the deed in the presence of two witnesses, who subscribe their names, and also his solemn acknowledgment before a judicial officer. The deed in question was not proved to have ever been executed with all these formalities. But if, after this due execution, it were altered in a *material* part, no matter by whom, or with whose consent; it was no longer the same deed. Pigot's case, 11 *Rep.* 27.

Mr. Justice TRIMBLE delivered the opinion of the Court:—

This writ of error is prosecuted to reverse a judgment of the Circuit Court, for the district of Ohio, rendered in favour of the defendants, in an action of ejectment instituted by the plaintiff in error against the defendants, in the Court below, to recover a tract of land in Perry county.

On the trial of the general issue, which was joined between the parties, the plaintiff gave in evidence a patent from the President of the United States to Jesse Spencer, dated the 15th of November 1811, for the land in controversy: a deed of conveyance for the land, from Jesse Spencer to William Steele, purporting to bear date the 20th of January 1818; and also a deed from William Steele to Robert Steele, dated the 7th of July 1821, prior to the institution of the suit.

It appeared, from a certificate on the deed from Jesse Spencer to William Steele, that it had been acknowledged, on the day of its date, before a justice of the peace; and it was attested by two subscribing witnesses.

The deed from Jesse Spencer to Steele, had never been recorded, either in the county where the land lies, or elsewhere. Wherever the name of William Steele appeared in the body of the deed, or in the label thereon, it appeared to have been written over an erasure, and with ink of a different colour, as did the words *Ross* and *Ohio*, in describing the place of residence of Steele. This was unaccounted for, by any testimony in the cause.

(Steele's Lessee vs. Spencer et al.)

The defendants gave in evidence, a record and decree of the Supreme Court of the state of Ohio, in a cause in which the heirs of Thomas Spencer and the defendants in this cause were complainants, and Jesse Spencer, the patentee of the land, was defendant.

This decree was rendered by the Supreme Court on the 3d of January 1820, while sitting in Ross county, having heard the cause in Perry county, where the suit was instituted, and where the land lies; and having held it under a advisement, as is the practice in Ohio, the decree was pronounced in the cause at Ross county, and was certified from thence to Perry county, to be there entered on record in the suit, in the same manner as if rendered while the Supreme Court was sitting in Perry county; and it was so entered on record accordingly.

The decree was also recorded in the office of the recorder of deeds, on the 24th of July 1822, in Perry county.

The decree, *inter alia*, ordered, Jesse Spencer, the patentee of the land, "within six months from the date of the decree, to make out a deed with covenants of general warranty, conveying to the complainants in that cause, and defendants in this, an undivided nine parts out of ten, or nine-tenths, of the tract of land in controversy; and to deposit said deed, duly executed, acknowledged, and attested, with the clerk of the Supreme Court of the county of Perry, within the said term of six months; and by the clerk to be delivered to the complainants, upon their paying and depositing with the clerk, within the said term of six months, certain sums of money, with interest, as specified in the decree; and that, upon the failure of the said Jesse Spencer to make out and deposit a deed, as above directed, within the said term of six months; that then and in that case, the complainants shall hold, possess, and enjoy, nine-tenths of the said tract of land in as full and ample a manner as if the same were conveyed to them by the said Jesse Spencer."

The defendants paid and deposited with the clerk the money required by the decree, within the six months, and took his receipt for the same.

It appears by a bill of exceptions tendered by the plaintiff's counsel, that after the evidence was closed, the counsel of the defendants moved the Court to instruct the jury, 1st, that the decree of the Supreme Court of the state of Ohio, given in evidence by the defendants, vested in them such a legal title to the land in question, as would have been vested by a conveyance from Jesse Spencer of equal date; and that the Registry Act of Ohio, applies as well to the title of the defendants, under the said decree, as it would do, if they held under a *bona fide* deed, of the same date, from the patentee.

(Steele's Lessee *vs.* Spencer et al.)

2. That if the elder deed be not recorded within the time specified by the Registry Act of Ohio, it is wholly void as to subsequent *bona fide* purchasers, without notice of the existence of such deed.

3d. That if the deed from Jesse Spencer to William Steele, was altered in a material point after it was sealed, attested, and acknowledged, such alteration absolutely avoids the deed; and it can convey no title to the lessor of the plaintiff: which instructions the Court gave, and the plaintiff excepted.

The counsel for the plaintiff, relies on the following points for a reversal of the judgment.

1. The Court below erred in charging the jury, that the Registry Act of Ohio applies as well to the title of the defendants, under the decree set forth in the bill of exceptions, as if they held under a *bona fide* deed of the same date.

2. That the Court below erred in charging the jury, that if the deed from Jesse Spencer to William Steele was altered in a material part, after it was sealed, attested, and acknowledged; such alteration absolutely avoids the deed, and it can pass no title to the lessor of the plaintiff.

The propriety of the first instruction, given by the Court to the jury, admits not of a doubt. The statute of Ohio, entitled "an Act directing the mode of proceeding in Chancery," declares "That where a decree shall be made for a conveyance, release, or acquittance, &c. and the party against whom the decree shall pass, shall not comply therewith by the time appointed, then such decree shall be considered and taken in all Courts of law and equity, to have the same operation and effect, and be as available, as if the conveyance, release, or acquittance, had been executed conformably to such decree."—*Land Laws for Ohio, p.* 296.

The Registry Act of Ohio directs, that all deeds made within the state, shall be recorded "within six months from the actual time of signing or executing of such deeds;" and declares, that if any such deed shall not be recorded, in the county where the land lies, within the time allowed by the Act, "the same shall be deemed fraudulent against any subsequent *bona fide* purchaser, for valuable consideration, without notice of such deed."

In the construction of Registry Acts, the term "purchaser" is usually taken in its technical, legal sense. It means a complete purchaser, or, in other words, a purchaser clothed with the legal title. The meaning of the statute is, that an unrecorded deed, shall, after the expiration of the time limited by the statute, be deemed fraudulent and void, as against all subsequent purchasers, who may have obtained the legal title, for valuable consideration, without notice. The case of the de-

fendants is then within the terms of the Registry Act. They obtained their decree, and paid the purchase money directed by the decree, without notice; and the decree had obtained, by operation of the statute, all the attributes of a perfect legal title.

The argument for the plaintiff on this branch of the case, was founded on a supposition, that, to bring the defendants' case within the terms of the Registry Act, it must be shown that their title has been recorded, as a deed, and their title being not a deed, but a decree, it is insisted, they are not within the terms of the statute. This is a mistake. The plaintiff's deed not being recorded, the statute avoids it in terms, as against all subsequent purchasers for valuable consideration, without notice, whether their titles be recorded or not. If the defendants had held under a conveyance executed by Jesse Spencer, in obedience to the decree, their title deed, although not recorded, would, by the terms of the statute, prevail against the plaintiff's prior unrecorded deed. A deed not being recorded, avoids it as against subsequent, but not as against prior purchasers. By the laws of the state of Ohio, the decree obtained by the defendants, clothes them with the legal title in as ample a manner as a deed. They are purchasers for valuable consideration, without notice; and are therefore not only within the words, but also within the spirit and intention of the statute.

This reasoning has been indulged upon a supposition, that the title of the defendants has not been sufficiently recorded, which is not admitted. The decree, which is their title, is of record in the Chancery suit in the proper county where the land lies, and it was recorded in the office of the recorder of deeds. Whether this last mode of recording the decree is usually practised in Ohio or not, we are not informed. But we suppose the defendants had done all they could do, to commit their title to record in the proper county.

The third instruction given by the Court to the jury, which forms the second ground relied on by the plaintiff's counsel for a reversal of the judgment, cannot be sustained. Although the proposition may be true, that a material erasure or alteration in a deed, after its execution, may avoid the deed, yet, the instruction ought not to have been given in the terms used by the Court. Whether erasures and alterations had been made in the deed or not, was a question of fact proper to be referred to the jury; but whether the erasures and alterations were material, or not, was a question of law which ought to have been decided by the Court. The instruction given refers the question of materiality to the jury, as well as the fact of alteration and erasure.

(Steele's Lessee vs. Spencer et al.)

If the name of William Steele was inserted in the deed as grantee after its full execution and attestation, instead of the name of some other grantee which was stricken out, no doubt the alteration was very material, and nothing could in that case pass by the deed to William Steele. The two other alterations supposed, in the words "Ross" and "Ohio," in the description of the grantee's residence, may have been either material or immaterial, as, upon a sound construction of the whole instrument they would or would not alter or change its operation and effect.

The Court ought to have decided the question of materiality in each instance, leaving the fact of alteration to the jury for their decision. The instruction given, was calculated to mislead the jury by impressing on them the belief that they were warranted in finding either of the supposed alterations to be material, however it may have been in point of law. The construction of deeds belongs to the province of the Court; the materiality of an alteration in a deed, is a question of construction; and in this case the Court committed an error by giving an instruction to the jury, which imposed on them a difficult question of construction, upon which the jury ought to have been enlightened by the decision of the Court.

The judgment of the Circuit Court must be reversed, and the cause remanded, with instructions to award a *venire facias de novo.*

WILLIAM S. NICHOLLS, AND OTHERS, APPELLANTS, *vs.* THOMAS HODGES, EXECUTOR OF THOMAS C. HODGES, DECEASED.

The Orphans' Court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the Court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory. {565}

If the executor has a claim on the estate of the deceased, it shall stand on an equal footing with other claims of the same nature. {565}

On a plenary proceeding, if either party shall require it, the Court will direct an issue or issues to be made up, and sent to a court of law to be tried; and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the Court of Chancery, or to a Court of Law; and in Maryland, the decision of the Court to which the appeal is made is final. {565}

The Supreme Court of the United States has jurisdiction of appeals from the Orphans' Court, through the Circuit Court for the county of Washington, by virtue of the Act of Congress of February 13, 1801; and by the Act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $1000 in order to entitle the party to an appeal. {565}

The commission to be allowed to the executor or administrator is submitted by law to the discretion of the Court, upon a consideration of all the circumstances, and it was obviously the intention of the legislature, that the decision of the Orphans' Court should be final and conclusive. {565}

The Court being satisfied by an examination of the evidence contained in the record of the proceedings of the Orphans' Court of the county of Washington, relative to a claim made upon the estate of the testator by the executor, that the said evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the Orphans' Court which allowed the claim. {566}

APPEAL from the Circuit Court of Washington county in the District of Columbia.

The defendant obtained letters testamentary on the estate of Thomas C. Hodges deceased, and passed his accounts in the Orphans' Court of Washington county, in which he was allowed 10 per cent. commission on the inventory of the deceased's estate amounting to $2358 70, and $1200 for services rendered by him to the deceased.

The testamentary law of Maryland, under which this commission was allowed, is in these words:—

"His commission, which shall be at the discretion of the Court, not under five per cent. nor exceeding ten per cent. on the amount of the inventory."—Act of Maryland, ch. 101, sub. ch. 10. sect. 2.

(Nicholls et al. vs. Hodges' Ex.)

The appellants, creditors of the deceased's estate, filed their petition in the Orphans' Court objecting to the allowance of these claims; and upon the answer of the appellee and the testimony taken in the cause, the Judge of the Orphans' Court decided in favour of the appellee, and allowed these claims. From this decision an appeal was prayed to the Circuit Court for Washington county, where the judgment of the Orphans' Court was affirmed.

From this decision this appeal was made.

The deposition of *William W. Corcoran, Philip T. Berry, John S. Hare*, James A. Magruder and Isaac S. Nicholls were taken, and were sent up with this record. These depositions were intended to prove, that the board and expenses of Thomas C. Hodges, were paid by the deceased, by whom he was employed in his store as an assistant. That when the executor was spoken to about the account he had raised against the estate of the testator, he stated, he was sorry he had brought forward the account, and that he should not have done so but by the advice of another. That he had said, that his uncle the testator did not agree to give him wages, but a share of the property was promised, but no agreement was made.

The depositions also stated, that some six months before the death of the testator, the defendant applied for wages, which were refused, and he was told to take money from the drawer, and goods from the store, and if not satisfied he might return to his father. That it was understood the appellee was in the store of the testator as a clerk. The testator observed at the time of making his will, that he had given the defendant, his nephew, a legacy, as a consideration for his services; he had always intended to give him something; he gave him the legacy for his services because he had not been paid for them. It was also testified that the executor had a good deal of trouble in settling the estate.

The counsel for the appellants endeavoured to maintain,

1. That the claims of the executor had been improperly allowed by the Court below.

2. That the evidence shows the commission allowed is unjust and unreasonable.

3. The appellee had no legal claim for services rendered to the deceased.

Mr. Key for the appellant.—

The evidence does not establish any claim to the compensation claimed by the appellee. On the contrary, he himself acknowledged he had no claim. But if any debt was due to him, the amount thereof could not be ascertained by the course adopted in this case. It must become the subject of proof like all other demands on the estate.

(Nicholls et al. vs. Hodges' Ex.)

It is contended that no appeal is allowed in this case, because the provisions of the law of Maryland leave to "the discretion" of the Court, the determination of the amount of commissions. What is the meaning of the assertion that no appeal can be maintained in such a case? It is only when the exercise of discretion by the Court is matter of favour or indulgence, that the rule applies; but when there are legal rights, the discretion of the Court applies to those rights, and its exercise is a matter of law, and like all others, when exercised is examinable.

Mr. Coxe for the appellee.—

This is an application to have an examination of an account which has been passed upon by the Orphans' Court. It is denied that a matter to be determined by the discretion of the Court, can be the subject of appeal. The party must point out an error in law, and if the allowance by the Court is not beyond the per centage authorized by the statute, there cannot be such error.

These accounts having been passed by the Orphans' Court, before whom were all the facts, the only remedy which remains is upon the bond given by the executor; and in such an action all the matters are open for examination.

Mr. Justice DUVAL delivered the opinion of the Court.—

The appellee in this case obtained letters testamentary on the estate of Thomas C. Hodges, deceased, and passed accounts in the Orphans' Court for Washington county, in which he was allowed ten per cent. commission on the inventory of the deceased's estate amounting to $2,358 70, and $1200 for services rendered to the deceased in his lifetime. The appellants, creditors of the deceased, finding that the estate would probably be insufficient to pay the full amount of their claims, filed their petition in the Orphans' Court objecting to the allowance of the claims of the executor, alleging that the property of the deceased consisted only of a store of goods in Georgetown, and a few debts due to him; and that the settlement of the estate was made without much labour or expense. Upon the answer of the executor, and the testimony taken in the cause, the Judge of the Orphans' Court decided in favour of the executor, and decreed that both claims be allowed. From this decree an appeal was prayed and granted to the Circuit Court for Washington county, in which the judgment of the Orphans' Court was affirmed. From this decision the cause is brought up, by appeal, to this Court for final hearing and decree.

Several questions have been raised in arguing this cause. On the part of the appellants, it is contended, First, that the

allowance of ten per cent. on the inventory, circumstanced as this case appears to be, is unjust and unreasonable. Secondly, That there is no foundation for the claim of $1200, made by the executor for services rendered the testator in his lifetime.

The counsel for the appellee contends, First, that the whole allowance made by the Orphans' Court was no more than a moderate compensation for the attention and prompt settlement of the accounts of the deceased, by the executor, and for his services for several years as a clerk in the store of the deceased; and secondly, that the decision of the Orphans' Court was final and conclusive, and from which there ought to have been no appeal.

The power and authority of the Orphans' Court is derived from the testamentary laws of Maryland. The last general Act upon the subject, is that passed in the year 1798, ch. 101. The Orphans' Court has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the Court, "not under five per cent. nor exceeding ten per cent. on the amount of the inventory." If the executor has a claim against the deceased, it shall stand on an equal footing with other claims of the same nature. On a plenary proceeding, if either party shall require, the Court will direct an issue or issues to be made up and sent to a Court of Law to be tried, and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the Court of Chancery, or to a Court of Law. And in Maryland, the decision of the Court to which the appeal is made, is final and conclusive. But in the case under consideration, this Court has jurisdiction by virtue of the Act of Congress of February 1801, by which the Circuit Court for the District of Columbia was created, which provides that "any final judgment, order or decree, in the said Circuit Court, wherein the matter in dispute, exclusive of costs, shall exceed the value of $100, may be re-examined, and reversed or affirmed in the Supreme Court of the United States, by writ of error or appeal." By an Act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $1000 in order to entitle the party to an appeal.

With respect to the commission to be allowed to the executor or administrator, it is submitted by law to the discretion of the Court, not less than five, nor more than ten per cent. They may allow the lowest, or highest rate, or any intermediate proportion between the *minimum* and *maximum*, to which, in their discretion, they may adjudge the party to be entitled

upon a consideration of all circumstances, according to the services rendered, and the trouble and expense in completing the administration. Upon a just construction of this Act, it was obviously the intention of the legislature, that the decision of the Orphans' Court should be final and conclusive, and such is the opinion of this Court.

The claim of $1200, for services rendered in the lifetime of the testator, rests upon different ground. The law places it "on an equal footing with other claims of the same nature." The legality and equity of the claim, must be examined in the same manner as the claim of any other creditor. Of course, it is a claim, on the trial of which either party might have required a trial by jury in the manner prescribed by law. But this was not asked, and the claim was submitted in gross to the decision of the Orphans' Court, and was decided on in like manner by the Circuit Court; and it is now brought in the same shape before this Court.

To support a claim of this nature, it is incumbent on the party making it to prove some contract, promise, or agreement, expressed or implied, in relation to it. The testimony contained in the record may be summed up in a few words. It is admitted by the appellee, that there was no agreement to pay him wages. It is in proof that he lived with his uncle three or four years in the capacity of a clerk, and that for more than half the time he was the only clerk in the store, his uncle having great confidence in him. That it was distinctly understood between them, that the testator had agreed to pay his board, to find him in clothing, and to pay his expenses generally; that it was customary among merchants to take young men, of a certain age, for their board and clothes; that the uncle had said that at a future day he intended to take him into partnership with him; and it was proved that the testator, at the time of making his will, observed that he had given his nephew a legacy as a consideration for his services, and that he had always intended to give him something. It is not denied that the testator had fully complied with his engagement to pay his board, supply him with clothes, and pay his expenses. On this testimony the claim rests. The evidence is too defective to require comment. It is the opinion of this Court that it is too loose and indeterminate to sanction the claim, and it cannot be allowed.

The decree of the Circuit Court, affirming the decree of the Orphans' Court, as to this claim, is reversed; in all other respects it is affirmed.

THE BANK OF COLUMBIA *vs.* GEORGE SWEENY.

The Court refused to issue a *mandamus* to the Circuit Court for the county of Washington, commanding that Court to strike off a plea which the Court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiffs' counsel deemed the proper plea, under the provisions of an Act of the legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia.

Messrs. Jones and Key, moved the Court for a *mandamus* to be directed to the Circuit Court of the United States, for the county of Washington, in the District of Columbia; commanding them to have a certain issue joined, which issue had been tendered in a proceeding in that Court against George Sweeny, and in which the Bank of Columbia were plaintiffs. George Sweeny being indebted to the Bank of Columbia, upon a promissory note, the President of the bank, in conformity with the provisions of the statute of Maryland, incorporating the bank, passed in 1793, (Acts of 1793, vol. 20,) instituted proceedings in the Circuit Court, under which, by virtue of a *capias ad respondendum*, he was arrested by the marshal; and he applied to the Court to be allowed, under the authority of the 14th section of the Act incorporating the bank, to "dispute" the debt claimed by the bank.

The Court thereupon ordered an issue to be joined, and the attorney of the bank being directed to draw a declaration, offered one tendering an issue upon the allegation that the debt mentioned in the execution was due. To this issue the attorney for the defendant objected, and he claimed the right to put in issue the plea of the statute of limitations. The Circuit Court held, that the defendant was entitled to avail himself of the statute, and that the attorney of the bank should file a declaration, in the common form on the promissory note mentioned in the execution, to which the defendant might plead the statute of limitations, as running from the time of payment mentioned in the note; and that the bank should reply, so as to make up the issue under the statute of limitations. The Court refused to make up the issue offered by the bank, or to make up the issue in any other way than as stated.

The plaintiffs claimed, and by this motion sought to maintain their claim, to have an issue joined as offered by the bank, *upon the debts being due*, as provided in the statute.

The following are the provisions of the 14th section of the charter, upon which the proceedings were had, and by which

the plaintiffs insisted they had a right to the proceedings they had adopted.—

"And, whereas it is absolutely necessary that debts due to the said bank should be punctually paid, to enable the directors to calculate with certainty and precision on meeting the demands that may be made upon them, Be it enacted, that whenever any person or persons are indebted to the said bank for moneys borrowed by them, or for bonds, bills or notes, given or endorsed by them, with an express consent in writing that they may be made negotiable at the said bank, and shall refuse or neglect to make payment at the time the same becomes due, the President shall cause a demand in writing on the person of the said delinquent or delinquents, having consented as aforesaid, or if not to be found, have the same left at his place of abode; and if the money so due shall not be paid within ten days after such demand made, or notice left at his last place of abode as aforesaid, it shall and may be lawful for the President, at his election, to write to the clerk of the general Court, or of the county in which the said delinquent or delinquents may reside, or did at the time he or they contracted the debt reside, and send to the said clerk the bond, bill or note due, with proof of the demand made as aforesaid, and order the said clerk to issue a *capias ad satisfaciendum*, *fieri facias*, or attachment, by way of execution, on which the debt and costs may be levied, by selling the property of the defendant for the sum or sums of money mentioned in the said bond, bill or note; and the clerk of the General Court, and the clerks of the several County Courts, are hereby respectively required to issue such execution or executions, which shall be made returnable to the Court whose clerk shall issue the same, which shall first set after the issuing thereof, and shall be as valid, and as effectual in law, to all intents and purposes, as if the same had issued on judgment regularly obtained in the ordinary course of proceeding in the said Court; and such execution or executions shall not be liable to be stayed or delayed by any *supersedeas*, writ of error, appeal, or injunction from the chancellor; provided always, that before any execution shall issue as aforesaid, the President of the bank shall make an oath, (or affirmation, if he shall be of such religious society as allowed by this state to make affirmation,) ascertaining whether the whole or what part of the debt due to the bank on the said bond, bill or note, is due; which oath or affirmation shall be filed in the office of the clerk of the Court from which the execution shall issue; and if the defendant shall *dispute* the whole or any part of the said *debt*, on the return of the execution, the Court before whom it is returned shall and may order an issue to be joined, and trial to be had the same Court at which the return is made, and shall make such other proceedings that justice may be done in the speediest manner."

(The Bank of Columbia ex. Sweeny.)

The case was argued by Mr. Jones and Mr. Key for the plaintiffs at great length, upon the meaning and objects of the section, and that it authorized the demand made by the bank to exclude the plea of the statute of limitations; and *contra* by Mr. Swann, and the Attorney General for the defendant. The Court, in their decision, did not take notice of the arguments of counsel, as they considered the case not such as entitled it to the summary proceeding demanded.

Mr. Chief Justice MARSHALL, delivered the opinion of the Court:—

This case arose under the provision of the Act of the legislature of Maryland incorporating the Bank of Columbia, which authorizes summary process for the collection of debts due to the bank. That Act allows an execution against the person of the debtor, to issue in the first instance, upon the application of the president of the bank; but it also authorizes the Court, if upon the return of the execution the defendant "dispute the debt," to order an issue to be made up, &c. to try the action.

In the present case, the Circuit Court did not refuse to direct such an issue to be made up; which had they refused to do, a mandamus would have been the proper process to compel that to be done, which the Act requires. But the Circuit Court did direct an issue, and allow a plea of the statute of limitations.

The application now is, that the Circuit Court be ordered to withdraw that issue, and to direct a different issue to be made up, according to what the counsel for the bank supposes to be the proper construction of the Act.

We think this is not a proper case for a mandamus. It does not differ in principle, from any other case in which the party should plead a defective plea, and the plaintiff should demur to it; in which case, there is no doubt that the revising power of this Court could be exercised only by a writ of error.

If this motion could now prevail, it would be a plain evasion of the provision of the Act of Congress, that *final* judgments only should be brought before this Court for re-examination. This case might still be brought before this Court by a writ of error, notwithstanding any opinion expressed upon the mandamus, and the same question again be discussed upon the final judgment. The effect therefore of this mode of interposition, would be to retard decisions upon questions which were not final in the Court below, so that the same cause might come before this Court many times, before there would be a final judgment.

The Court is therefore of opinion that this is not a case for a mandamus, and the motion is denied.

STEPHEN WARING, PLAINTIFF IN ERROR, *vs.* JAMES JACKSON, EX-DEVISE OF MEDCEF EDEN AND ANOTHER, DEFENDANTS IN ERROR. THE SAME *vs.* THE SAME.

The testator devised to his son Joseph Eden certain portions of his estate in New York, among which were the premises sought to be recovered in this suit, to him, his heirs, executors and administrators for ever. In like manner he devised to his son Medcef, his heirs and assigns, certain other portions of his property; and adds the following clause: "It is my will and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths without lawful issue, I give all the property aforesaid to my brother John Eden, of Lofters, in Cleveland in Yorkshire, and my sister Hannah Johnson, of Whitby in Yorkshire, and their heirs." Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New-York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden on the death of his brother Joseph Eden became seised of an estate in fee simple absolute. {571}

Adverse possession taken and held under a sheriff's sale, by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the Courts of New-York, prevent the operation of a devise by another, in whom the title to the estate was vested by the death of the defendant in the executions. {571}

It has been the uniform course of this Court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases. {571}

Mr. Justice THOMPSON delivered the opinion of the Court.—

These cases come up from the Circuit Court of the United States for the southern district of New-York, upon writs of error. The question in the Court below, turned upon the construction of the will of Medcef Eden the elder, bearing date the 29th August 1798, by which the testator devised to his son Joseph, certain portions of his estate, among which were the premises in question in this cause. "To him, his heirs, executors, and administrators for ever." In like manner he devised to his son Medcef, his heirs and assigns, certain other portions of his property, and adds the following clause. "Item. It is my will and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths without lawful issue, then I give all the property aforesaid to my brother John Eden of Lofters, in Cleveland in Yorkshire; and my sister Hannah Johnson of Whitby, in Yorkshire, and their heirs."

(Waring *vs.* Jackson et al.)

The case of Jackson *vs.* Chew, (12 *Wheat.* 153,) decided at the last term, brought under the consideration of this Court the construction of this same clause in the will, and the records in the present cases have been submitted to the Court without argument, to see whether the decision in that case, will govern the cases now before us. The facts disclosed in the case of Jackson *vs.* Chew, did not require of the Court to decide any other question, than whether Joseph Eden took under the will an estate tail, which by operation of the statute of New-York, abolishing entails, would be converted into a fee simple absolute. The Court decided that he did not take an estate tail, but an estate in fee, defeasible in the event of his dying without issue in the lifetime of his brother, (which event happened,) and thereupon his interest in the land became extinct, and the limitation over to his brother Medcef was good as an executory devise.

In the cases now before the Court, it appears, that Medcef Eden has died without issue, having by his last will and testament devised his estate to his widow, and certain other devisees therein named; which has given rise to two other questions; viz. whether John Eden and the heirs of Hannah Johnson (she being dead) took any estate in the premises, under this clause in the will, on the death of Medcef Eden, without issue?

And whether the possession taken and held under the sheriff's sale, by virtue of the judgments and executions against Joseph Eden, was such an adverse holding, as to prevent the operation of the will of Medcef Eden the younger.

In deciding the case of Jackson *vs.* Chew, we did not enter into an examination of the construction of this clause in the will, considered as an open question; but adopted the construction, which appears to be well settled in the two highest Courts of Law in the state of New-York, not only upon this very clause, but in numerous other analogous cases; and has thereby become a fixed rule of landed property in that state.

And this was in conformity with what has been the uniform course of this Court, with respect to the titles to real property, to apply the same rule that we find applied by the state tribunals in like cases.

The additional questions presented in the cases now before us, have likewise undergone a very full examination in that state, and been decided both by the Supreme Court, and the Court for the correction of Errors. In the case of Wilkes *vs.* Lion, (2 *Cowan*, 333,) the decision turned upon these very points, and the Court of Errors affirming the decision of the Supreme Court, held with only one dissenting voice, that nothing passed under the ulterior devise over to John Eden and Hannah Johnson, but that Medcef Eden had become seised of an estate in fee

simple absolute. No opinion appears to have been directly expressed by the Court, with respect to the effects of the adverse possession upon the operation of the devise in the will of Medcef Eden the younger.

But this was a question necessarily involved in the result. And the decisions of the Courts in that state are very satisfactory to show, that such an adverse possession will not there, prevent the operation of a devise.

The doctrine in the case of Doe *vs.* Thompson, (5 *Cowen*, 374) warrants this conclusion. And it is understood that this precise question, arising on the construction of the statute of wills in that state, has recently been decided in the Supreme Court, in a case, the report of which is not to be found here.

We are accordingly of opinion, that the judgments of the Circuit Court in these cases must be affirmed.

THE UNITED STATES, PLAINTIFFS IN ERROR, *vs.* NICHOLAS STANSBURY AND EDWARD MORGAN.

The discharge, by the Secretary of the Treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against sureties for the amount due upon the judgment, and unpaid. {575}

At *Common Law*, the release of a debtor whose person is in execution, is a release of the judgment itself. The law will not permit proceedings by a creditor at the same time against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released. {575}

ERROR to the Circuit Court of the United States for the district of Maryland.

This was an action of debt, brought in the Circuit Court of the United States for the district of Maryland, at May Term 1825, to recover 3067 dollars, being the debt, damages, costs, and charges, contained in a certain judgment between the same parties, recovered by the United States in the District Court of Maryland, at March Term 1819. The original judgment was rendered upon a joint and several bond of these defendants, given for duties on an importation by Sheppard, and was rendered for 3050 dollars debt, and seventeen dollars damages, costs, and charges. The declaration in this case was in the usual form, containing averments that the said judgment still remains in full force and effect, not in any wise annulled, reversed or vacated—that the said United States have not obtained any satisfaction of or upon the said judgment, and that the said defendants have not yet paid the sum of 3067 dollars, or any part thereof; but to pay the same or any part thereof, they have and each of them hath hitherto wholly refused, &c.

The writ in this case was served upon Stansbury and Morgan only, and not upon Sheppard. The two former appeared, and pleaded in bar of this action: that they were sureties for Sheppard in the bond upon which the said judgment was recovered. That after the said judgment was recovered, and before this suit was commenced, Sheppard was taken and imprisoned by virtue of a *capias ad satisfaciendum*, issued upon said judgment, and discharged from prison by order of the Secretary of the Treasury, under the Act of Congress passed on the 6th June 1798, on condition that he should pay the costs, and assign and convey to the use of the United States, all his property, real, personal, and mixed, by an instrument approved by the

(The United States vs. Stansbury et al.)

then District Attorney of the United States for that district; which order of the Secretary is set forth literally in the plea. The plea then avers, that the said Sheppard did assign and convey all his estate, &c., by an instrument approved by the District Attorney, and did pay the costs according to the conditions imposed by the Secretary, and was thereupon voluntarily released and discharged from the said execution, by the said Secretary, without the consent and against the will of them the said Stansbury and Morgan.—Therefore they pray judgment, &c. To this plea, there was a general demurrer and joinder, and judgment was rendered for the defendants, *pro forma*, in the Circuit Court, upon which judgment the United States have brought a writ of error to this Court.

For the United States, it was contended, that the judgment ought to be reversed, and judgment rendered for the United States.

The defendants in error claimed—

1. That the discharge of Sheppard from the execution of the plaintiff, operated as a release to all the defendants.

2. That the defendants, as sureties, were exonerated by the compromise made with the principal without their concurrence.

3. That at all events, the plaintiff cannot have judgment upon the pleadings in this cause, as the demand embraces the whole amount of the judgment in the District Court.

The case was argued by Mr. Wirt, Attorney General for the United States, no counsel attending on the part of the defendants in error.

The following cases were cited by Mr. Wirt, in the course of his argument. Dean *vs.* Newhall, 8 *T. R.* 168. Rowley *vs.* Stoddard, 7 *John.* 206. 5 *Co. Rep.* 86, *b.* Foster *vs.* Jackson, *Ibid.* 52. Vejus *vs.* Aldwick, 4 *Burr*, 2482. Jacques *vs.* Withy, 1 *T. R.* 557. Tanner *vs.* Hague, 7 *T. R.* 420. Blackburn *vs.* Stupert, 2 *East*, 243. Clark *vs.* Clement, 6 *T. R.* 526. M'Lean *vs.* Whiting, 8 *John. Rep.* 339. Hayling *vs.* Mulhall, 2 *Bl. Rep.* 1235. 2 *Shower*, 394. 2 *Ld. Ray.* 1072. 5 *East*, 147. Hurst *vs.* The United States, 1 *Gal.* 32. 1 *Saund.* 330. 1 *Chitty*, 107–8.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This was an action of debt on a judgment which had been rendered in favour of the United States, against Thomas Sheppard, and the two defendants in error. The marshal returned, as to Sheppard, *non est inventus*. The other two defendants pleaded that they were sureties to Sheppard, in the bond on which the former judgment was rendered; that the United

States took out a *ca. sa.* on that judgment, against Sheppard, by virtue of which he was imprisoned; whereupon William H. Crawford, the Secretary of the Treasury of the United States, released the said Sheppard from execution, on his paying costs, and conveying all his property, real, personal, and mixed, to the United States; with which condition, it is admitted, Sheppard complied. The United States demurred, and the Circuit Court gave judgment on the demurrer, *pro forma*, for the defendants; which judgment is now before this Court on a writ of error.

It is not denied, that at Common Law, the release of a debtor whose person is in execution, is a release of the judgment itself. Yet the body is not satisfaction in reality, but is held as the surest means of coercing satisfaction. The law will not permit a man to proceed at the same time against the person and estate of his debtor; and when the creditor has elected to take the person, it presumes satisfaction, if the person be voluntarily released. The release of the judgment is, therefore, the legal consequence of the voluntary discharge of the person by the creditor.

This being the positive operation of the Common Law, it may unquestionably be changed by statute.

The United States contend, that it is changed by the Act providing for the relief of persons imprisoned for debts due to the United States. That Act authorizes the Secretary of the Treasury, on receiving a conveyance of the estate of a debtor confined in jail at the suit of the United States, or any collateral security, to the use of the United States, to discharge such debtor from his imprisonment under such execution; and he shall not be again imprisoned for the said debt; "but the judgment shall remain good and sufficient in law, and may be satisfied out of any estate, which may then or at any time afterwards belong to the debtor."

The sole duty of the Court is to construe this statute according to its words, and the intent of the legislature. Did Congress design to discharge the sureties or to release the judgment?

The Act is "For the relief of persons imprisoned for debts due to the United States," not for the relief of their sureties; and does not contain a single expression conducing to the opinion, that the mind of the legislature was directed towards the sureties, or contemplated their discharge. The only motive for the Act, being to relieve debtors who surrender all their property, from the then useless punishment of imprisonment; there can be no motive for converting this Act of mere humanity, into the discharge of other debtors, whose condition it does not in any measure deteriorate. If the Act produces this

effect, it is an effect contrary to its intention, occasioned by a technical rule, originating in remote ages; which has never been applied to a statutory discharge of the person.

But the language of the statute has guarded against this result. It has expressly declared, that the judgment shall remain good and sufficient in law. How can this Court say that it is not good, and is not sufficient? If it be good and sufficient, for what purpose is it so? Certainly, for the purposes for which it was rendered—to enable the United States to proceed regularly upon it, as upon other judgments; with the single exception, made by the Act itself. The voluntary discharge of a debtor, by his creditor, is a release of the judgment, because such is the law. But in this case, the legislature has altered the law. It has declared that the discharge of a debtor in the forms prescribed, shall amount solely to a liberation of the person—not to a release of the judgment. That shall remain good and sufficient. Were Courts to say, that, notwithstanding this provision, the judgment is released, it would amount to a declaration that a technical rule, in the Common Law, founded in a presumption growing out of the simplicity of ancient times, and not always consistent with the fact, is paramount to the legislative power. It would in fact be to repeal the statute. It would unquestionably be to defeat the object of the legislature; since it would be no very hardy assertion to say, that, if the discharge of the person in custody discharged the other obligors, the imprisoned debtor would never be released, while the debt remained unpaid; unless the insolvency extended to all the obligors.

The second point made by the counsel for the defendants, that the sureties are exonerated by the compromise made with the principal without their concurrence, is the same in principle with that which has been considered. No compromise of the debt has been made. The course prescribed by the law has been pursued. The whole property of the imprisoned debtor has been surrendered, and on receiving it, his person has been discharged. The Act of Congress declares, that the judgment shall still remain in force. If the creditor had entered into a compromise not prescribed by law, or had given any discharge not directed by statute, the question might have been open for argument. But, while the whole transaction is within the precise limits marked out by law, it cannot produce a result directly opposite to that intended by the statute. The only doubt which can be suggested respecting the intent of the legislature, is created by the last words of the sentence, declaring, that the judgment shall remain good and sufficient in law. They are "and may be satisfied out of any estate which may then, or at any time afterwards belong to the debtor." These words are cer-

tainly useless; and may be supposed to indicate an idea, that it could be satisfied out of the estate of the debtor only. That as they are not required to render that estate liable, they may be understood to limit the right of the creditor to obtain satisfaction from the estate of any other person. We do not however think this the correct construction. The words are considered as mere surplusage, not as limiting the rights of the United States to proceed against all those who are bound by the judgment.

We think, then, that the Circuit Court ought to have sustained the demurrer; and that the judgment which overrules it ought to be reversed. But considering the plea, and the manner in which the cause has been brought up, the Court will not direct an absolute judgment to be entered for the United States; but will reverse the judgment and remand the same for further proceedings, that the Circuit Court may give leave to the defendants to plead.

This cause came on &c. on consideration whereof, It is adjudged and ordered, that the judgment of said Circuit Court in this cause be and the same is hereby reversed and annulled, and that the cause be remanded, that the said Circuit Court may give leave to the defendants to plead.

THE BANK OF COLUMBIA, USE OF THE BANK OF THE UNITED STATES, *vs.* JOHN LAWRENCE.

A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the endorser of the note living in the county of Alexandria within the District of Columbia, and having, what was *alleged* to be, a *place of business* in the City of Washington; and the notice of the non-payment of the note, enclosed in a letter and superscribed with his name, was put into the post-office at Georgetown, addressed to him at that place. Held that this notice was sufficient. {582}

In cases where the party entitled to notice resides in the country, unless notice sent by the mail is sufficient, a special messenger must be employed for the purpose of sending it, but this case is not one which required such a duty. {582}

If the defendant had a place of business in the City of Washington, and the notice served there would be good, yet it by no means follows, that service at his place of residence in another place, would not be equally good. Parties may be and frequently are so situated, that notice may well be given at either of several places. {582}

That is not properly a place of business in the commercial understanding of the terms, which has no public notoriety as such, no open or public business carried on at it by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party only engaged in settling up his old business. {582}

The general rule is that the party whose duty it is to give notice of the dishonour of a bill or note, is bound to use due diligence in communicating the same. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or not, the holder has done all that the law requires of him. {582}

It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence in a question of law. {583}

The rules relative to diligence ought to be reasonable and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description. {583}

When a person has a dwelling-house, and a counting-room in the same city or town, a notice sent to either place is sufficient;—if parties live in different post towns, notice through the post-office is sufficient. Notice, to a party living at another place than the holder, sent by mail to the nearest post-office, is good under common circumstances, and in such cases where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice. {583}

Some countenance has lately been given in England, to the practice of sending a notice by a special messenger in extraordinary cases, by allowing the holder to recover of the endorser the expenses of serving the notice in this manner. The holder is not bound to use the mail for the purpose of sending the notice. He *may* employ a special messenger if he pleases, but it has not been decided that he *must*. To compel the holder to the expense of a special messenger would be unreasonable. {584}

(The Bank of Columbia vs. Lawrence.)

ERROR to the Circuit Court of the United States for the county of Washington.

The plaintiffs in error instituted a suit on a promissory note against the defendant in error, who was the endorser thereon, and which was discounted at the Bank of Columbia, and protested for non-payment. The note was dated at Georgetown, where the banking house of the plaintiff at that time was located, and was payable at the Bank of Columbia. The evidence on the part of the plaintiffs established all the facts relative to the note, which were proper to be proved, except the notice of non-payment to the defendant, the endorser; and the bill of exceptions tendered by the plaintiffs, presented the evidence at length, upon which the question arose, whether due notice of the dishonour of the note had been given, and due diligence had been used by the plaintiffs to convey such notice to the defendants.

The opinion of the Court as delivered by Mr. Justice Thompson, contains a full exhibition of all the evidence, from which the conclusions of the Court were drawn.

The case was argued by Mr. Key and Mr. Dunlop, for the plaintiffs, and by Mr. Jones and Mr. Taylor, for the defendant.

For the plaintiffs it was urged, that the distance of the actual residence of the defendant from Georgetown created a difficulty in giving him a personal notice; and it is not incumbent on the holder of a note to follow the endorser, or to resort to other than the ordinary modes of conveyance; the post-office has always been deemed this mode, and it was the usage of this bank, as well as of all other banks in the District of Columbia to proceed in this manner. It was claimed that the defendant knew of this usage. This usage, therefore, became a part of the contract; and that an agreement to comply with the usage is binding, has been decided at the present session of this Court, in Brent's Executors *vs.* The Bank of the Metropolis, *(ante p. 89.)* Benner *vs.* The Bank of Columbia, 9 *Wheat.* 590. Mills *vs.* The Bank of the United States, 11 *Wheat.* 431. These cases show that a departure from the general law relative to a demand of payment, when according to established custom, was sustained.

The evidence showing that the defendant transacted business at his former residence in Washington, does not establish *that* as his established place of business, and if it did, the bank was not obliged to give a notice there, as it was not in the place where the note was dated, and where the note was payable. Objections of equal, perhaps of greater validity, would have been made had any other mode been employed; and therefore the notice through the post-office, which gave the opportunity to find it where the defendant was accustomed to receive his letters, was the most proper. The reasonableness of notice is a

question to be decided by the Court—the time of giving notice and the place where, are questions of law. Tindall *vs.* Brown, 1 *T. R.* 167. *Chitty on Bills*, 292. Where the holder and endorser reside in the same town, the rule is, that the notice must be personal, or left at the endorser's residence, or place of business. When the endorser's residence or place of business is in a different town, the holder is not bound to follow him there, but may give notice through the post-office. *Chitty on Bills*, 288. Ireland *vs.* Kipp, 10 *John. Rep.* 490. Same *vs.* Same, 11 *John.* 231.

What constitutes a place of business is a question of law, although the facts in reference thereto may be for the decision of the Jury, and in this case, the Court below had the right to say, and should have said the evidence was not sufficient, supposing it uncontradicted, to make the house of the former residence of the defendant his place of business. Cited *Chitty on Bills*, 285–6. Bank of Utica *vs.* Smith, 18 *John.* 230. 16 *John. Rep.* 218. Reed *vs.* Payne.

Mr. Jones and Mr. Taylor, for the defendant.

The claim to maintain the rights of the plaintiffs, by showing a usage relative to notice of the dishonour of notes or bills may, if it shall be admitted, establish a principle of great danger in reference to the subject matter. The usage will operate in favour of an endorser, who by residence or other circumstances, may be supposed to be acquainted with it, and another, a distant endorser, will not be within its influence. A waiver of the regular mode of giving notice of the dishonour of a bill cannot be implied, it must be proved to have been expressly declared. *Chitty*, 308.

2. The notice should have been sent to the place of the defendant's business, and this was in Washington; and the holder of a bill, must adopt the usual means to convey or give the notice. 11 *John.* 490. The nearest post-office may not always be the proper post-office; as cases may exist in which, for convenience, a party is in the practice of going to and using a more distant post-office. 10 *John.* 411. Nor is a post-office the proper place to leave a notice not intended to be *conveyed from it;* as post-offices are places from which letters are to be *forwarded*, and it is not their duty to receive, or are they responsible for letters which are to be *left* in them.

The expense of sending a special messenger is to be paid by the party to whom he is sent, and as the defendant was not a resident of Georgetown, such a messenger should have been employed to give the notice. *Chitty on Bills*, 276, 278.

Mr. Justice Thompson delivered the opinion of the Court.—

This case comes before the Court upon a writ of error to the Circuit Court of the District of Columbia.

(The Bank of Columbia vs. Lawrence.)

The defendant was sued as endorser of a promissory note for $5000, made by Joseph Mulligan, bearing date the 15th of July 1819, and payable sixty days after date, at the Bank of Columbia. The making and endorsing the note, and the demand of payment, were duly proved; and the only question upon the trial was touching the manner in which notice of non-payment was given to the endorser; no objection being made to the sufficiency of the notice in point of time.

The material facts before the Court upon this part of the case, as shown by the bill of exceptions were; that the banking-house of the plaintiffs was in Georgetown, at which place the note appears to be dated. That some time before the note fell due, the defendant had lived in the city of Washington, and carried on the business of a morocco leather dresser, keeping a shop and living in a house of his own, in the said city. That about the year 1818, he sold his shop and stock in trade and relinquished his business, and removed with his family to a farm, in Alexandria county, within the District of Columbia, and about two or three miles from Georgetown. That the Georgetown post-office, was the nearest post-office to his place of residence, and the one at which he usually received his letters.

The notice of non-payment was put into the post-office, at Georgetown, addressed to the defendant at that place. It was proved, on the part of the defendant, that at the time of his removal into the country, and from that time until after the note in question fell due, he continued to be the owner of the house in Washington where he formerly lived; and which was occupied by his sister-in-law Mrs. Harbaugh. That he came frequently and regularly every week, and as often as two or three times a week, to this house; where he was employed in winding up his former business and settling his accounts, and where he kept his books of account, and where his bank notices, such as were usually served by the runner of the bank on parties who were to pay notes, were sometimes left, and sometimes at a shop opposite to his house; and where also his newspapers and foreign letters were left. That his coming to town and so employing himself, was generally known to persons having business with him. That his residence in the country was known to the cashier of the bank. That there was a regular daily mail from Georgetown to the city of Washington, and that the defendant's house was situated in Washington, less than a quarter of a mile from Georgetown.

There was also some evidence given, on the part of the plaintiffs, tending to show that the usage of the bank in serving notices in similar cases, was conformably to the one here pursued, and that the defendant was apprized of such usage. But

that testimony may be laid out of view; as this Court does not found its opinion in any measure upon that part of the case. Upon this evidence the plaintiffs prayed the Court to instruct the jury, that it was not incumbent on them to have left the notice of the non-payment of the note at the house occupied by Mrs. Harbaugh, as stated in the evidence; but that it was sufficient, under the circumstances stated, to leave the notice at the post-office in Georgetown; which instructions the Court refused to give, but instructed the jury that their verdict must be governed according to their opinion and finding on the subject of usage which had been given in evidence.

The jury found a verdict for the defendant.

From this statement of the case it appears that the note was made at Georgetown, payable at the Bank of Columbia, in that town. That the defendant, when he endorsed the note, lived in the county of Alexandria, within the District of Columbia, and having what is alleged to have been a place of business in the city of Washington; and the notice of non-payment was put into the Georgetown post-office addressed to the defendant at that place, by which it is understood, that the notice was either enclosed in a letter, or the notice itself sealed and superscribed with the name of the defendant, with the direction "Georgetown" upon it; and whether this notice is sufficient is the question to be decided.

If it should be admitted, that the defendant had what is usually called a place of business in the city of Washington, and that notice served there would have been good; it by no means follows, that service at his place of residence, in a different place, would not be equally good. Parties may be and frequently are so situated, that notice may well be given at either of several places. But the evidence does not show that the defendant had a place of business in the city of Washington, according to the usual commercial understanding of a place of business. There was no public notoriety of any description given to it as such. No open or public business of any kind carried on, but merely occasional employment there, two or three times a week, in a house occupied by another person; and the defendant only engaged in settling up his old business. In this view of the case the inquiry is narrowed down to the single point, whether notice through the post-office at Georgetown was good; the defendant residing in the country two or three miles distant from that place, in the county of Alexandria.

The general rule is, that the party whose duty it is to give notice in such cases, is bound to use due diligence in communicating such notice. But it is not required of him to see that the notice is brought home to the party. He may employ the

usual and ordinary mode of conveyance, and whether the notice reaches the party or not, the holder has done all that the law requires of him.

It seems at this day to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence is a question of law. This is certainly best calculated to have fixed on uniform rules on the subject, and is highly important for the safety of holders of commercial paper.

And these rules ought to be reasonable and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of parties, the circulation of paper of this description; and the rules which have been settled on this subject, have had in view these objects. Thus, when a party entitled to notice, has in the same city or town a dwelling-house and counting-house or place of business, within the compact part of such city or town, a notice delivered at either place is sufficient, and if his dwelling and place of business be within the district of a letter carrier, a letter containing such notice addressed to the party and left at the post-office, would also be sufficient. All these are usual and ordinary modes of communication, and such as afford reasonable ground for presuming that the notice will be brought home to the party without unreasonable delay. So when the holder and endorser live in different post towns, notice sent by the mail is sufficient, whether it reaches the endorser or not. And this for the same reason, that the mail being a usual channel of communication, notice sent by it, is evidence of due diligence. And for the sake of general convenience it has been found necessary to enlarge this rule. And it is accordingly held, that when the party to be affected by the notice, resides in a different place from the holder, the notice may be sent by the mail to the post-office nearest to the party entitled to such notice. It has not been thought advisable, nor is it believed that it would comport with practical convenience, to fix any precise distance from the post-office, within which the party must reside, in order to make this a good service of the notice. Nor would we be understood, as laying it down as a universal rule that the notice must be sent to the post-office nearest to the residence of the party to whom it is addressed. If he was in the habit of receiving his letters through a more distant post-office, and that circumstance was known to the holder, or party giving the notice, that might be the more proper channel of communication, because he would be most likely to receive it in that way; and it would be the ordinary mode of communicating information to him, and therefore evidence of due diligence.

In cases of this description, where notice is sent by mail to a party living in the country, it is distance alone or the usual

course of receiving letters which must determine the sufficiency of the notice. The residence of the defendant therefore being in the county of Alexandria, cannot affect the question. It was in proof that the post-office in Georgetown was the one nearest his residence, and only two or three miles distant, and through which he usually received his letters. The letter containing the notice, it is true, was directed to him at Georgetown. But there is nothing showing that this occasioned any mistake or misapprehension with respect to the person intended, or any delay in receiving the notice. And, as the letter was there to be delivered to the defendant, and not to be forwarded to any other post-office, the address was unimportant, and could mislead no one.

No cases have fallen under the notice of the Court, which have suggested any limits to the distance from the post-office, within which a party must reside in order to make the service of the notice in this manner good. Cases however, have occurred, where the distance was much greater, than in the one now before the Court, and the notice held sufficient. (16 *John.* 218.) In cases where the party entitled to notice resides in the country, unless notice sent by mail is sufficient, a special messenger must be employed for the purpose of serving it. And we think that the present case is clearly one which does not impose upon the plaintiffs such duty. We do not mean to say no such cases can arise, but they will seldom, if ever, occur, and at all events such a course ought not to be required of a holder, except under very special circumstances. Some countenance has lately been given to this practice in England in extraordinary cases, by allowing the holder to recover of the endorser the expenses of serving notice by a special messenger. The case of Pearson *vs.* Crallan, (2 *Smith's Rep.* 404. *Chitty*, 222, *note,*) is one of this description. But in that case the Court did not say that it was necessary to send a special messenger, and it was left to the jury to decide whether it was done wantonly or not. The holder is not bound to use the mail for the purpose of sending notice. He *may* employ a special messenger, if he pleases, but no case has been found where the English Courts have directly decided that he *must.* To compel the holder to incur such expense would be unreasonable, and the policy of adopting a rule that will throw such an increased charge upon commercial paper, on the party bound to pay, is at least very questionable.

We are accordingly of opinion that the notice of non-payment was duly served upon the defendant, and that the Court erred in refusing so to instruct the jury.

Judgment reversed and a *venire facias de novo* awarded.

JOHN ARCHER AND JOHN W. STUMP, EXECUTORS OF JOHN STUMP, COMPLAINANTS AND APPELLANTS, *vs.* MARY DENEALE, WIDOW AND EXECUTRIX OF GEORGE DENEALE DECEASED, CHARLES T. STUART AND ANN LUCRETIA HIS WIFE, MARY CATHARINE AND NANCY P. DENEALE, CHILDREN AND REPRESENTATIVES OF THE SAID GEORGE DENEALE, DEFENDANTS AND APPELLEES.

The testator, residing and owning real and personal estate in the county of Alexandria, District of Columbia, by his will gave "all his estate, real and personal, to his wife during her life, for the use and purpose of raising and educating his children," each child at the age of twenty-one to be entitled to an equal portion of his estate, real and personal; subject, each, to a deduction of one-third for the maintenance of his wife. He recommends his wife to sell the negroes for a term of years, and directs "an appraisement" only of "his estate" shall be made, that no sale of the furniture shall be made; and then states that he is indebted to no one, and proposes to continue so," that he is surety for his brother, for which he holds a deed of trust on his property, sufficient, he hopes, to pay the same, and directs that his "estate shall not be sold to pay these debts, until the property so divided shall be sold," when his "estate must be charged with any deficiency, and directs that his executors shall not give security, as his own estate did not require it." This will does not charge the real estate of the testator with his debts. {588}

The word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation. {589}

Under the laws of Virginia relative to the estate of deceased persons, lands are never appraised. {589}

THIS was an appeal, by the complainants, in a bill filed in the Circuit Court for the county of Alexandria, upon which a decree was rendered in favour of the defendants, appellees in this Court.

The complainants by their bill sought to make the real estate of George Deneale liable for the payment of their debt. They set forth, that they have a subsisting judgment against the *executrix* of George Deneale, for the sum of $7957 58, besides interest and costs. That this judgment was founded on a contract between James Deneale and George Deneale, and the testator of the complainants. That $2913 65 of this judgment was satisfied by a sale of the property of James Deneale the principal, leaving a balance due on the judgment of $5000.

The bill charges that George Deneale left a considerable estate real and *personal*. That the personal estate has been exhausted in the payment of the debts of the said George Deneale, in a regular course of administration,—and that there is

nothing left to pay their debt but the real estate, which the bill alleges is *expressly* charged by his will with the payment of it, in a certain event; which event it is alleged has happened, to wit, that the property of James Deneale has been sold, and the deficiency of it to pay the debt ascertained.

The bill prays an account of the personal estate and of the balance due to the complainants on their said judgment, and that so much of the real estate of the said George Deneale as will be necessary to pay what is due them, may be decreed in pursuance to his will, to be sold, and the proceeds applied to pay that balance, and for general relief.

Mary Deneale the executrix, in her answer admits the judgment against the testator as security for James Deneale: That the said James Deneale had reduced the claim considerably below what is demanded by the bill. That her testator died *possessed* of a large personal estate, consisting principally of bank and other stocks, standing in his name, which have been claimed by Conway Whittle and others, *as specifically belonging to them*, by a suit depending in the Court of Alexandria county. She states, if the bank and other stock claimed as before stated shall be decided to belong to the estate of her testator, there will be personal estate sufficient to pay his debts. If they should be decided to belong to the said Whittle and others, then there will not be a sufficiency of personal estate to pay all his debts, if his estate is bound to pay this demand of the complainants.

She denies that the real estate of her testator is charged in *any event* with the payment of the debt due to the complainants. That he never intended to make any such charge upon it—and that upon a fair construction of the will no such charge is authorized by it.

The defendant Nancy P. Deneale, by her guardian, *ad litem*, answers substantially as the executrix has. To their answers is a general replication and issue.

The other defendants being non-residents, there is an order of publication against them, and the bill taken for confessed.

The commissioner made his report, which shows that he has charged the executrix with the appraised value of the personal estate, including the stocks, instead of the *actual* value as proved by the sale of all the personal estate, except the stocks, which are claimed by others. It will appear from the circumstances detailed by the commissioner, if the stocks are excluded, that the executrix has paid more than the value of the personal estate, including debts due to her testator and received by her.

The will, which is made an exhibit, is dated 13th of February, 1815, and is admitted to record 11th July, 1818.

By his will the testator gives to his wife "all his estate real

and personal during her life for the *use and purpose* of raising and educating his children until they respectively are twenty-one." He directs that each child shall, *at that age*, become entitled to an equal portion of his *estate* both real and personal, "subject each to a deduction of one-third of the same" to be retained for the support and maintenance of his wife. He recommends to his wife to sell the *negroes for a term of years*. He directs that an appraisement only of his "estate" shall be made; that no sale of furniture shall take place. He then states that he is indebted to "no one, and proposes to continue so." He states that he is security for his brother James for two sums, for which he has a deed of trust on his property, sufficient he hopes to pay the same. He then directs that his "*estate* shall not be sold to pay *these* debts until the property so *deeded* shall be sold"—when his "estate must be charged with any deficiency." He directs that his executrix and executor should not give security, alleging that his own debts did not require it. He closes his will by giving a gold ring of fifty dollars value to a friend, and a bank share to the Masonic Lodge.

After a hearing on the bill, answer, the will of George Deneale, and the report of the commissioners, the Circuit Court dismissed the bill with costs.

The only question for the decision of the Supreme Court was whether George Deneale had, by his will, charged his *real estate* with the payment of the debt due to the complainants below, the appellants in this Court.

Mr. Swann for the appellants.—

The testator charges his estate with the residue of the debt which may remain due to the executor of Stump. The words are—

"I direct that my estate shall not be sold to pay these debts until the property so deeded shall be sold, when my estate must be charged with any deficiency."

The term "estate," includes real as well as personal property, and where there is nothing to qualify the word "estate" it will carry real as well as personal property. 8 *Vez. Jun.* 608.

Having then said his "estate" must be charged, we must look into the will, and see whether there is any thing there to qualify the term.

The testator devises to his wife "all his estate," both real and personal, during her life. The reversionary interest is left to take its legal course.

He then directs "that an appraisement only of my estate be made, and that no sale of furniture shall take place."

The meaning of this would depend upon extraneous circumstances. Estate here was intended to be the personal estate.

Then comes the clause, "my estate must be charged with

the deficiency." What was his meaning? The term estate is competent to effect this intent. In making a construction, the Court will make a man do what is morally just. 3 *Vez.* 551. Whenever a testator wills that his debts shall be paid, that rides over every disposition, whether against heir or devisee. 3 *Vez.* 379.

Mr. Lee for the appellees.—

The first question is, what was the real intention of the testator? That intention must prevail. 2d. It is alleged that the direction—that on a certain contingency his "estate must be charged with any deficiency," was to pay the particular debt of the plaintiff; and that the word "estate" included his real estate.

It is true that there are many cases in which the word "estate" in a will, has been held to convey "*real estate*" even in fee simple. But these words, and every form of expression, whereby a testator declares his will in respect to the disposition of his property, must submit to the rule, which requires a will to be construed agreeably to the *intention* of the testator, where it can be collected from the whole will. 2 *Roper on Wills*, 619.

The case of Woolman *vs.* Kenworthy, 9 *Vez.* 137, is very analogous to the present case. The general principle decided in that case, was, that under the general word "estate" in a will, real estate will pass, unless restrained as was in that instance by the intention collected from the whole will.

Then construe the will of Mr. Deneale by this rule, and by these cases; it is plain that he has not charged his real estate, in any event, with the payment of this debt. Cited also Shaw *vs.* Bull, 12 *Mod. Reports.*

Mr. Chief Justice MARSHALL delivered the opinion of the Court:—

This suit was brought in the Circuit Court for the District of Columbia, sitting in the county of Alexandria, to subject the lands of George Deneale to the payment of a debt for which he was surety. The sole question arises on the construction of his will. The complainants contend, that it charges his lands with his debts.

By his will, the testator gives to his wife "all his estate real and personal, during her life, for the use and purpose of raising and educating his children, until they respectively are twenty-one." He directs, that each child shall, at that age, become entitled to an equal portion of his estate, both real and personal, "subject each to a deduction of one-third of the same," to be retained for the support and maintenance of his wife. He recommends to his wife, to sell the negroes for a term of years. He directs that an appraisement only of his

estate "shall be made, that no sale of furniture shall take place." He then states, that he is indebted to no one, and purposes to continue so. He states, that he is surety for his brother James, for two sums, for which he has a deed of trust on his property, sufficient, he hopes, to pay the same. He then directs that his estate shall not be sold to pay these debts, until the property so deeded shall be sold, when his estate must be charged with any deficiency. He directs that his executor and executrix should not give security, as his own debts did not require it.

That the word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with other words which indicate an intention to charge them, is a proposition which cannot be controverted. As little is it to be denied, that the word alone, if not used with an intent to subject the lands of the testator to the payment of his debts, cannot have that effect.

In the will under consideration, the testator alludes in two instances to his property, generally; in both he uses the words "estate," both "real and personal." In the next instance, the word estate is introduced alone, in the clause which follows: "*item*, I do hereby direct, that an appraisement only of my estate be made, and that no sale of furniture shall take place."

In Virginia, lands are never appraised, and the law directs a sale of all perishable articles. When, therefore, the testator directs that an appraisement only of his estate be made, and that no sale of furniture shall take place, he obviously applies the term, exclusively, to that kind of property, the appraisement of which is directed by law, and is usual; and, by adding the word "only," restrains his executors from selling that property which is directed by law to be sold. In this clause, the word estate is plainly confined to personalty. He then speaks of the debts for which he is surety for his brother James, and directs that his "estate" shall not be sold to pay these debts, until the property conveyed to him in trust shall be exhausted. This direction is obviously restrictive. It restrains the executors from using a power they possess under the law. That power is to sell the personal estate for the payment of debts, but it does not extend to the sale of lands; consequently, the word estate, in this place, also designates only personal estate. After this prohibition to sell his estate, until the trust property should be all applied to the object, he adds, "when my estate must be charged with any deficiency."

There is no foundation for the opinion, that the testator has used the word estate, in this part of the sentence, in a different sense from that in which it was used in the same sentence im-

mediately before, while treating of the same subject. The same estate, the sale of which he had just forbidden until a particular event should take place, must, he says, be sold when that event shall take place. He means only his personal estate.

It would, we think, be an entire perversion of the language used by the testator, to construe these words a charge upon his estate. He does not intend to create any liability, which the law had not created. When the trust property shall be exhausted, his estate, he says, "must be charged with the deficiency." He can no longer prevent its sale.

We think there is no error in the decree, which declares that the will of George Deneale does not charge his real estate with his debts, and that the bill of the complainants be dismissed with costs, and that the said decree be affirmed.

JOHN TAYLOE, PLAINTIFF IN ERROR, *vs.* ELISHA RIGGS, DEFENDANT IN ERROR.

The rule of law is, that the best evidence must be given, of which the nature of the thing is capable; that is, that no evidence shall be received, which pre-supposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption, that, if produced, it might not operate in favour of the party who is called upon for it. For this reason, a party who is in possession of an original paper, is not permitted to give a copy in evidence or to prove its contents. {596}

The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least in a Court of Law. {596}

It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received. {596}

The testimony which establishes the loss of a paper, is addressed to the Court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove any thing in the cause. {597}

This action being upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. {598}

When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in Court, who makes a claim which he cannot support. {600}

When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon

uncertain and vague impressions, made by a conversation antecedent to the reduction of the agreement. {600}

WRIT of error to the Circuit Court for the county of Washington.

This suit was instituted by the defendant in error in the Circuit Court for the county of Washington, for the recovery of a sum paid by him to the plaintiff in error, on a purchase of 7462 shares of stock in the Central Bank of Georgetown and Washington; the plaintiff in the suit alleging, that he had paid to the extent of three per centum on the said stock, upon a contract, that if the Bank should not declare a dividend which would repay him the said three per cent., that the same should be refunded to him. The contract had been reduced to writing, and had afterwards been lost, mislaid or destroyed by the plaintiff.

The declaration contained three counts; 1. Stating a conversation between the plaintiff and the defendant, concerning the sale of the stock, held by the defendant in the bank; and that in the conversation it was agreed, that the defendant should sell to the plaintiff the shares held by him at par; that the defendant represented that a dividend would be made on the same, of four per cent., and stated that the plaintiff should advance and pay to the defendant, so much of the *dividend* as had then been earned by the bank; and that confiding in the said representations, and believing the dividend would be made, he, the plaintiff, agreed to advance the supposed earnings of the stock, which according to a calculation amounted to three per cent., and a memorandum in writing of the agreement was then made; the stock was then transferred to the plaintiff, and he paid the defendant the par price of the same, and advanced or paid to him the sum of $1902, being the supposed earnings of the bank, at the time of the contract—that at the time of the contract, the bank had made no profits on which a dividend could be declared, nor did the bank, on the regular day of declaring the dividend, make any dividend upon the said stock, by means of which the defendant became bound to refund the sum so advanced for the supposed earnings of the bank. 2. Count *indebitatus assumpsit*, for money had and received. 3. Count *indebitatus assumpsit*, for money laid out, &c.

On the trial of the cause, William Hebb was offered and examined, subject to exceptions to his testimony as a witness on the part of the defendant in error, in relation to the contract between the parties. This evidence is fully stated in the opinion of the Court.

The defendant below requested of the Court certain intructions which were refused, and a bill of exceptions to this refusal was allowed by the Court. A verdict and judgment having

been given for the plaintiff below, the case was brought by writ of error from this Court.

Mr. Charles Carter Lee and Mr. Jones for the plaintiff in error.

1. The plaintiff below had not laid a sufficient ground for the introduction of the secondary evidence, which he afterwards produced. The written contract described in his affidavit, is not that proved by the parol evidence, but differs from it essentially. As the contract described was an *executed contract*, that proved by parol testimony was *executory*.

2. The contract described in the affidavit, was one upon which an action for a *tort* might be sustained, and that proved was in *contract*.

3. If the secondary evidence was admissible, William Hebb was not competent to prove the contract; he does not recollect the terms of the contract, and is not therefore a witness to prove it. Fox's lessee *vs.* Palmer, 2 *Dal.* 214.

He had not read it, but had heard it read, which, as has been decided, was equivalent only to reading a copy. 1 *Camp.* 193. 1 *Stark. Rep.* 167. This uncertainty as to the contents of the contract, and that there was within the process of the Court a witness who had made out a copy, are also objections to his testimony. Nor does the evidence show with any distinctness, an agreement to do what was claimed by the plaintiff below.

4. The evidence was not admissible upon either count of the declaration, as the testimony given varied from the *allegata* in both; and the effect of the evidence would be to explain a written contract, which cannot be done by *parol*. This evidence can only be given to explain an ambiguity. Cope *vs.* Atkins, 1 *Price*, 143, and also 404 in the same volume.

That evidence also showed the contract to be executory, and not a contract to refund or pay the dividend, for breach of which *indebitatus assumpsit* will not lie. Cutler *vs.* Powell, 6 *T. R.* 320. 2 *Petersdoff*, 418. Cook *vs.* Munstone, 4 *Bos. & Pull.* 351. Leeds *vs.* Burrows, 12 *East*, 1.

Nor does the declaration allege a contract to refund the dividend, nor any consideration sufficient to raise such a contract. The judgment being general, if any one count was bad, the judgment must be arrested. 6 *T. Rep.* 691. A sale of the supposed profits of a bank does not, *ex vi termini*, include an agreement to refund them, if no profits are made; nor are representations of the prospects of dividends the subjects of an action.

Mr. Swann and Mr. Key for the defendant in error.

After the decision of the Court below, the only question in the case is, what was the agreement of the parties. It was a sale of *stock* at par, and of the dividends; and the defendant in

error did not get the dividends which he had *advanced* to the plaintiff in error, and there was an implication that they should be repaid. The evidence was contradictory, and was proper for the jury.

As to the admission of parol testimony to explain written evidence, it is an established principle, that the acts of the parties at the time of the making of the contract may be proved by parol. Many cases might be cited to establish this principle.

As to the breach of the contract, and the liability of the plaintiff in error, the books of the bank show that at the time of the sale of the stock, no profits were made; the plaintiff in error having been president of the bank, knew this, and he knew that the three per cent. beyond the par value of the stock was an *advance*, and must be *repaid*, and this may be recovered by *indebitatus assumpsit*.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This action was brought in the Circuit Court for the District of Columbia, by Elisha Riggs, the defendant in error, to recover back a sum of money paid on a contract for the purchase of stock.

The declaration contained two counts; the first on the contract, which was in writing; the second for money had and received by the defendant, to the use of the plaintiff.

At the trial, the plaintiff in the Circuit Court, offered testimony to prove the contents of the contract, having first given notice to the defendant to produce the duplicate copy which had been delivered to him, when it was executed, and made an affidavit that the copy which had been retained by him, was either destroyed or lost.

The secondary evidence was admitted, the defendant in the Circuit Court reserving all objections, both to its admissibility and competency.

The first count in the declaration states a conversation between the parties on the 15th of May 1818, concerning the sale of the stock, which the said John Tayloe held in the Central Bank of Georgetown; and alleges, that it was then and there agreed, that the said John should sell to the said Elisha, the stock which he held in the said bank, amounting to 7642 shares at par; and further, that the said John represented that a dividend of four per cent. would be made on the said stock, at the ensuing first Monday in July, and insisted that the said Elisha should advance to him, in addition to the par value, so much of the said dividend as the said stock had already earned, which according to a calculation then made,

amounted to three per cent. The declaration further alleges, that the said Elisha, confiding in the representations of the said John, did agree to advance the supposed earnings of the said stock. The agreement was then reduced to writing, and signed by the parties. It was further agreed, that the said Elisha might confirm or annul the contract in days. The declaration further states, that, confiding entirely to the representations of the said John, the said Elisha did agree to confirm the said agreement, and did agree to buy the said stock, at par price, and to advance to the defendant the profits, which the stock was supposed to have earned.

The declaration then charges, that the stock was transferred, its par value paid, and the additional sum of three per cent., its supposed earnings, amounting to 1902 dollars, paid. The declaration further charges, that at the time of the contract, the bank had made no profit on which a dividend could be declared; and that it was not competent for the said bank, on the said first Monday in July, then next following, to declare any dividend; and, that in fact the bank did not declare any dividend on the said stock, of which the said defendant had notice; by means whereof he became liable and bound to refund the money so advanced, for the supposed earnings of the said stock, and being so liable, he in consideration thereof assumed, &c.

William Hebb, a witness produced by the plaintiff below, deposed, that he came into a room in which the parties were sitting, when the said Tayloe informed him, that the said Riggs was about to purchase his stock, and he requested the witness to take a seat and be an evidence to the contract. The said Riggs then asked the said Tayloe what were his terms? He answered that he would take par, with the dividend which would be declared at the next periodical term, which he thought would be four per cent. Mr. Riggs said, he supposed Mr. Tayloe meant only the interest which had accrued at that time, to which Mr. Tayloe assented; a calculation was then made, and the supposed profit estimated at three per cent. The plaintiff asked time to consult his friends, and said he would take the stock on the terms offered. The plaintiff, at the request of the defendant, drew up a memorandum of the agreement, which was read over hastily in the presence and hearing of the witness. It was copied, signed, and attested by the witness, and each party took one.

He understood, a day or two afterwards, that the contract was affirmed. On being cross-examined, the witness said that he did not recollect whether the written contract expressed that par was to be paid for the stock, nor that any advance upon the stock was specified; nor does he recollect, how the contract

was expressed. But his impression and belief is, that the understanding of the parties was that three per cent. was to be paid upon a contingency that the next dividend amounted to four per cent., and that the written contract was to the same effect.

The counsel for the defendant below, objected both to the admissibility and competency of this testimony: but the Court overruled his objections, and permitted it to go to the jury. To this opinion he excepted.

The first question to be considered, is, whether parol testimony, could, in this case, be let in to prove the written contract.

The rule of law is, that the best evidence must be given of which the nature of the thing is capable; that is, that no evidence shall be received, which presupposes greater evidence behind, in the party's possession or power. The withholding of that better evidence, raises a presumption, that, if produced, it might not operate in his favour. For this reason, a party who is in possession of an original paper, or who has it in his power, is not permitted to give a copy in evidence, or to prove its contents.

When, therefore, the plaintiff below offered to prove the contents of the written contract on which this suit was instituted, the defendant might very properly require the contract itself. It was itself superior evidence of its contents, to any thing depending on the memory of a witness. It was once in his possession, and the presumption was that it was still so. It was necessary to do away this presumption, or the secondary evidence must be excluded. How is it to be done away? If the loss or destruction of the paper can be proved by a disinterested witness, the difficulty is at once removed. But papers of this description generally remain in possession of the party himself, and their loss can be known in most instances only to himself. If his own affidavit cannot be received, the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, would amount to a complete loss of his rights, at least in a Court of Law. The objection to receiving the affidavit of the party is, that no man can be a witness in his own cause. This is undoubtedly a sound rule, which ought never to be violated. But many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, which facilitate the preparation for it, often depend on the oath of the party. An affidavit to the materiality of a witness, for the purpose of obtaining a continuance; or a commission to take his deposition, or an affidavit of his inability to attend;

is usually made by the party, and received without objection. So, affidavits to support a motion for a new trial are often received. These cases, and others of the same character which might be adduced, show, that on many incidental questions which are addressed to the Court, and do not affect the issue to be tried by the jury, the affidavit of the party is received.

The testimony which establishes the loss of a paper is addressed to the Court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove any thing in the cause. As this fact is generally known only to the party himself, there would seem to be a necessity for receiving his affidavit in support of it.

In the Courts of Common Law of England, we find some cases, in which the affidavit of a party has been received, respecting collateral facts which occur in the progress of a cause; and in Courts of Equity, it is usual when a bill is filed to set up a written instrument which is lost, to annex an affidavit to the bill, that the instrument is lost. In Forbes *vs.* Wale, 1 *Sir W. Black. Rep.* 532, the plaintiff offered a bond in evidence, attested by two witnesses, on proving the death of one of them; but being himself examined, acknowledged the other to be living. He was nonsuited. It cannot be doubted, that had he sworn the other subscribing witness was dead, he would have been allowed to prove the bond. In Morrow *vs.* Saunders, 3 *Moore's Rep.* 671, the plaintiff was permitted to have access to a paper in the possession of the opposite party, on his own affidavit that there was no copy or counterpart in his possession, nor had there ever been one between the parties, except that in possession of the defendant. In Jackson *vs.* Frier, 16 *John.* 198, the Supreme Court of New-York indicated the opinion, that secondary evidence might be admitted to prove the contents of a paper, on the affidavit of the party to its loss. Mr. Chief Justice Spencer, in delivering the opinion of the Court, quoted *Godbolt*, 193, in which the Court refused to permit the depositions of witnesses taken in a suit between the same parties, to be read, unless affidavit be made that the witnesses were dead; and also *Godbolt*, 326, in which the Court said, that if the party cannot find a witness, he is as it were dead unto him; and his deposition, in an English Court, in a cause between the same parties, may be allowed to be read to the jury, so as the party make oath that he did his endeavour to find the witness but that he could not.

In the former decisions in this cause, 9 *Wheat.* 483, this question was, we think, substantially, though not expressly determined.

When we compare the mischief to be apprehended from the

admission of secondary proof, on the affidavit of the party, where there is reason to believe that other testimony to that fact cannot be adduced, with the mischief to arise from the absolute exclusion of such an affidavit, we think the views of justice will be best promoted by allowing the affidavit, not as conclusive evidence, but as submitted to the consideration of the Court, to be weighed with the other circumstances of the case. In the case before the Court, it is not probable that any other testimony of the loss of the paper was attainable; and we think, the affidavit of the party laid a proper foundation for the admission of secondary evidence. Secondary evidence having been properly admitted, and the transfer of the stock and the payment of the purchase money proved, the next inquiry is into its competency, to establish the contract stated in the declaration.

This not being an action for deceit and imposition, but on a written contract, the right of the plaintiff to recover is measured precisely by that contract, and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper been produced, neither party could have been permitted to show his inducements to make it, or to substitute his understanding of it, for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this.

Discarding the representation made by the vendor of the profits of his stock, we are to inquire what was the actual agreement. The declaration states a parol agreement to sell and purchase the stock at par. But this agreement appears not to have been definitive, since a sale of the stock would pass it in its then condition, comprehending the dividends to be thereafter declared upon it. The parties therefore proceed to a consideration of that part of the subject, which respects the profits; and, after concurring in the opinion that the stock was worth par, independent of the next ensuing dividend, which they supposed would be four per cent. calculate how much of this sum was already earned. They found that three per cent. was the proportion of this estimated profit, which had accrued at the date of the sale. The whole contract, thus completed, was reduced to writing and signed by the parties. It is a contract to sell all the bank stock of the vendor, rating the stock itself at par, and the dividends which had already accrued thereon, at three per cent. No stipulation was made to return this sum of three per cent. or a part of it, if no dividend or a less dividend than four

per cent. should be declared, nor to add to the sum, if a larger dividend should be declared than was estimated by the parties.

Does the testimony offered by the plaintiff in the Circuit Court prove this contract?

A conversation was in its progress between the parties respecting the sale and purchase of the stock, when the witness came into the room, and was requested to notice their agreement. Mr. Riggs then asked Mr. Tayloe, what were his terms? Mr. Tayloe answered that he would take par, with the dividends which would be declared at the next periodical term, which he supposed would be four per cent. Four per cent. was assumed as the dividend which would be declared, and three per cent. was estimated as the portion of that dividend which had already accrued. This proposition was accepted, and the agreement reduced to writing.

If the declaration counts on one entire contract for the sale of the stock, including the dividend upon an estimate of the stock, at par, and the approaching dividend at four per cent.; the testimony supports it: if the declaration counts on two distinct contracts, entirely independent of each other, this part of the testimony does not support it. The witness describes a single contract, consisting, it is true, of two distinct items, but both are comprehended in the same agreement.

On being cross-examined, the witness shows a very imperfect recollection of the contract he is endeavouring to describe. He does not recollect that par was to be paid, nor that any advance on the stock was specified in the contract. But his impression and belief is, that three per cent. was to be paid upon a contingency that the next dividend amounted to four per cent. and that the written contract was to the same effect.

This part of the testimony shows, that what the witness had previously said, was founded on his recollection of the conversation between the parties which formed the verbal agreement, not on his recollection of the writing itself. He does not remember the terms in which the written contract was expressed; nor that par was to be paid for the stock; nor that any advance was specified. He believes that the written contract conformed to the verbal agreement, and on this belief is founded his impression, that the three per cent. was to be paid on a contingency that the next dividend should amount to four per cent. Yet, when we refer to his description of the conversation which constituted the verbal agreement, no part of the consideration money is stipulated to be paid on a contingency.

The declaration does not state a contingent contract; nor is any inference to be drawn that it was contingent, from any part of the declaration, unless it be from the use of the word "*ad-*

vance," which word, or any other equivalent to it, the witness does not remember.

When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in Court, who makes a claim which he cannot support. When parties reduce their contract to writing, the obligations and rights of each are described, and limited by the instrument itself. The safety which is expected from them, would be much impaired, if they could be established upon uncertain and vague impressions made by a conversation antecedent to the reduction of the agreement.

A part of the testimony came out on the cross examination, which serves to show on what uncertain ground the belief of the witness was founded, that the three per cent. depended on the contingency, that the next dividend should amount to four per cent. He was asked, whether the writing was, as deposed by another witness, in these terms, or in terms to this effect: "I bind myself to receive at any time within three days, three per cent. advance upon my stock in the Central Bank of Georgetown and Washington." He answered that the writing, as recollected by him, was the reverse of the terms above propounded, inasmuch as the writing described by him bound the defendant to transfer the stock. This answer would indicate, that the written contract bound the vendor to transfer his stock, at any time within three days, at three per cent. advance.

Upon the most attentive comparison we can make of the testimony given by Hebb, with the contract stated in the declaration, we think that his evidence does not support the contract as laid, and was therefore not competent to sustain the first count.

The second count, for money had and received, is not supported by any express promise to refund the money supposed to be advanced on account of the dividend, if less than four per cent. should be declared, or if no dividend should be made. It rests on the promise which the law implies, where the consideration totally fails. If the written contract comprehended the dividend, with the stock itself, so that an advance of three per cent. was given for the whole, the circumstance that this entire agreement was founded on a calculation of the separate value of the distinct parts, which were the subject of it, would not entitle the purchaser to recover upon this count, because the consideration would not totally fail. Could the contract for the dividends be considered as entirely distinct from

that for the stock itself? The Court is not prepared to say, that a mere speculative bargain, where the parties know that they are treating for a thing of uncertain value, which depends on unknown contingencies, and may greatly exceed their estimate, or may be nothing; where the purchaser knows that he buys a chance, as a lottery ticket; is a bargain on which the law will raise a promise to refund the purchase money, if the consideration should fail. It is therefore the opinion of the Court, that the testimony does not show a contract which supports the second count.

The defendant in the Circuit Court then gave evidence to the jury, tending to prove that the contract was a mere purchase of stock, at an advance of three per cent.; and then moved the Court to instruct the jury, "that the evidence given by the plaintiff, either taken by itself, or in connexion with that of the defendant, is not competent and sufficient to be left to the jury, as evidence that the said written contract continued to be executory after the transfer of the stock by the defendant to the plaintiff, and the payment therefore by the plaintiff, as stated by the plaintiff's evidence; nor, that it contained any stipulation or condition, that the three per cent. advance on the said stock, was paid or agreed to be paid by the plaintiff, on a contingency that the next dividend amounted to four per cent.; or that the defendant should refund, to the plaintiff, the three per cent. advance upon the par value of the stock paid by the plaintiff, as aforesaid, in the event of there being no dividend declared upon such stock, at the then next ensuing regular period for declaring such dividend. The Court refused to give this instruction, as prayed, being of opinion, that so much of the said contract as relates to the advance of the three per cent. portion of the dividend, is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day."

It is probable that the Circuit Court might not have intended to express an opinion respecting the effect of the testimony laid before the jury, but we think such an opinion is expressed. The Court declares that so much of the said contract as relates to the advance of the three per cent. portion of the dividend, is executory, in so far as it regarded the implied *assumpsit* of the defendant to refund, &c.

These words, we think, determine that the testimony established this implied *assumpsit*. On the question whether such a contract was proved as did raise this *assumpsit*, there was, undoubtedly, much conflicting testimony, and the Court erred, as we think, in declaring that opinion to the jury.

After several proceedings in Court, which it is unnecessary

to mention, as they do not materially affect the merits of the cause, the plaintiff prayed the Court to instruct the jury, that if from the whole evidence the jury should be of opinion, that the defendant in his written contract, did agree to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend, which he stated and represented would be declared at the next dividend day; and if the jury should be farther of the opinion, that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief created by the defendant, that such dividend would be made, that then the plaintiff would be entitled to recover back the money so paid under such mistaken impression, if the jury should find from the evidence that there was no such dividend declared; and that the said stock had not at the time of the said contract, earned any such supposed interest or dividend.

This instruction was ultimately given by the Court. In discussing its correctness it is necessary to recollect that this is an action on a written contract, not for deceit or misrepresentation in making that contract. The inquiry then is, what was the contract? Not how it was obtained. The representation then of the seller respecting the next dividend, and the belief of the purchaser, may be discarded from the case; and our attention must be confined to the contract as stated in the prayer of counsel. The jury were instructed to find for the plaintiff, if they were satisfied from the evidence that the defendant in his written contract agreed to sell his stock at par; and to take the earnings which the said stock had made, in lieu of the dividend to be declared at the next dividend day; and if they should also be satisfied that the plaintiff did actually advance to the defendant the amount of the said supposed earnings of the stock, under a belief that such dividend would be made. This instruction, when given on the naked contract stripped of that alleged misrepresentation which forms no part of it, cannot, we think, be supported.

We are therefore of opinion, that there is error in the proceedings of the Circuit Court, and that the judgment ought to be reversed, and the cause remanded to the Circuit Court, with directions to set aside the verdict and award a *venire facias de novo*.

This cause came on, &c. on consideration whereof, This Court is of opinion that there is error in the several instructions given by the Circuit Court to the jury, in this, that the said Court instructed the jury that the evidence given by the plaintiff in that Court, was competent to support both the first and second counts in the declaration; and also in this, that the said

(Tayloe vs. Riggs.)

Court instructed the jury, that so much of the said contract as relates to the advance of the three per cent. portion of the dividend is executory, in so far as regarded the implied *assumpsit* of the defendant to refund the said three per cent. advance, in the event of there being no dividend on the said dividend day; and also in this, that the said Court instructed the jury to find for the plaintiff, if they should be satisfied from the evidence that the defendant in his written contract agreed to sell his stock at par, and to take the earnings which the said stock had made in lieu of the dividend to be declared at the next dividend day, and that in fact no dividends were made. Wherefore it is considered and adjudged by this Court, that the said judgment be, and the same is hereby reversed and annulled, and that the cause be remanded to the Circuit Court, with directions to award a *venire facias de novo*, and to take other proceedings according to law.

HUMPHREY FULLERTON, JOHN CARLISLE, AND JOHN WADDLE, PLAINTIFFS IN ERROR, *vs.* THE PRESIDENT, DIRECTORS AND COMPANY OF THE BANK OF THE UNITED STATES, DEFENDANTS IN ERROR.

The state of Ohio, not having been admitted into the Union until 1802, the Act of Congress passed May 8th 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state Courts into the Courts of the United States, could have no operation in that state; but the District Court of the United States, established in that state in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full Circuit Court jurisdiction, with power to create a practice for its own government. The District Court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state Courts, and by a single rule adopted the state system of practice. When in 1807, the seventh Circuit was established, the judge assigned to that Circuit, found the practice of the state adopted, in fact, into the Circuit Court of the United States, and the same has since, so far as it was found practicable and convenient, by a uniform understanding, been pursued without any positive rule upon the subject. {612}

The Act of 18th February, 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the Courts of the United States, and the suits have in many instances been prosecuted under it. {613}

It will not be contended, that the practice of a Court can only be sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn Acts of the Court through the course of years, is to be surprised and turned out of Court, upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty, where long acquiescence has established it to be the law of the Court, that the state practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. {613}

The course of prudence and duty in judicial proceedings in the United States, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach. The duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our Courts must do their duty; but until then, it is administering justice in the spirit of the Constitution, to conform as nearly as possible, to the administration of justice in the Courts of the several states. {614}

Although the Act of the legislature of Ohio regulating the mode of proceeding in actions on promissory notes, was passed after the making of

(Fullerton et al. vs. The Bank of the United States.)

the note upon which this action was brought, yet the Circuit Court of the United States for the district of Ohio, having incorporated the action under that statute, with all its incidents, into its course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted. {615}

Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions of the Circuit Court, in this case, were more favourable to the parties to the note, where the Court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity. {616}

THIS was a writ of error brought to reverse a judgment rendered in the Circuit Court of the United States, for the District of Ohio, in favour of the Bank of the United States, the present defendants in error. The declaration contains a common count for money lent and advanced. The plea is *non assumpserunt*. There is another plea of *non assumpsit*, filed by H. Fullerton alone, and under it, a notice, that he will off-set a large sum of money, $3957 33⅓, due by the bank to the said Fullerton, being the avails of a certain note (the note on which the action was brought) which was discounted by the said Fullerton at the office of discount and deposit in Cincinnati, and the proceeds of which he had never checked out. There is another notice of off-set by all the defendants—that the plaintiffs are indebted to the defendant Fullerton, in a large sum of money, $5000—being the avails of a certain promissory note (the note on which plaintiff's action is founded) which has never been paid by the bank to Fullerton, or received by him, but retained by the plaintiffs; and Fullerton applies the same, by way of discharge and set-off to the said note made to plaintiffs. The cause was tried by a jury; and, on the trial, the plaintiff exhibited in evidence, a certain note, a copy of which follows:

$4000. *Cincinnati, February* 1, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States at Cincinnati, four thousand dollars, for value received.

(Signed) Isaac Cook.

Endorsed—*John Carlisle, John Waddle, Humphrey Fullerton.*

Isaac Cook, the drawer of the note, died pending the suit, and before the trial. To the introduction of this note in evidence the defendants objected, as evidence of a several contract of the drawers and each one of the endorsers, and not of any

joint undertaking or liability of the defendants. This objection was overruled by the Court, and the note permitted to be read in evidence, under the eighth section of the Act of the General Assembly of Ohio, entitled, "An Act to regulate judicial proceedings, where banks and bankers are parties, and prohibit the issuing bank bills of a certain description," passed 18th February, 1820; to which decision of the Court the defendants excepted.

The eighth section of the Act provides, "That when any sum of money due and owing to any bank or banker shall be secured by endorsements on the bill, note, or obligation for the same, it shall be lawful for such bank or banker to bring a joint action against all the drawers or endorsers, in which action the plaintiff or plaintiffs may declare against the defendants jointly for money lent and advanced, and may obtain a joint judgment and execution for the amount found to be due; and each defendant may make the same separate defence against such action, either by plea or upon trial, that he could have made against a separate action; and if in the case herein provided for, the bank or banker shall institute separate action against drawers and endorsers, such bank or bankers shall recover no costs. *Provided always*, that in all suits or actions prosecuted by a bank or banker, or persons claiming as their assignees or under them in any way for their use or benefit, the sheriff upon any execution in his hands in favour of such bank or banker, their or his assignee as aforesaid, shall receive the note or notes of such bank or banker, from the defendant in discharge of the judgment, and if such bank or banker, their or his assignee or other person suing in trust for the use of such bank or banker, shall refuse to receive such note from the sheriff, the sheriff shall not be liable to any proceedings whatever at the suit, or upon the complaint of the bank or banker, their or his assignee as aforesaid."

The facts of the case, so far as they were considered as important to the decision of the Court, are fully stated in the opinion delivered by Mr. Justice Johnson.

The case was argued for the plaintiffs in error by Mr. Leonard, and by Mr. Sergeant for the defendants.

The counsel for the plaintiff made the following points:—

1. The Circuit Court erred in admitting the note in evidence under the money counts in the declaration, for if the statute of Ohio could be used as authority for the form of action, the death of one of the parties, during the suit, determined the right to proceed under that statute.

2. The statute of Ohio, regulating the practice of the state, is not obligatory as to the practice of the Courts of the

United States, and the statute of 18th February 1820, was passed after the making of the note on which this action is founded.

3. There was no proof of demand of payment of the note, and the endorsers on the note were discharged by this omission; and by the course the bank adopted in reference to the note after its non-payment by the drawer.

4. The notice of the non-payment was not given in time to the endorsers.

Leonard insisted the Court erred in admitting the note in evidence, under the money counts. The statute of Ohio, authoriaes joint actions against "*all* the drawers, or endorsers." 23 *vol. Ohio Laws, p.* 361. This action was instituted against the drawers and endorsers, and the drawer died before trial. Although disjunctives are sometimes construed conjunctively, yet no case could be cited, in which it had been held that a disjunctive might be construed conjunctively, at *one* time, and, at *another*, agreeably to its literal signification. The statute being in derogation of the principles of the common law, authorizing a joint action against several persons, on several distinct and dissimilar contracts, was *strictissimi juris*, and, after the death of the drawer, no suit could be instituted or prosecuted under it. This construction was fortified by another law of Ohio, requiring the property of the principal to be exhausted before that of the security is made liable, which was held to apply as between drawers and endorsers on accommodation notes.

2. The bill of exceptions, distinctly raises the question, whether the statutes of Ohio regulating the state practice, are obligatory, *vi propria*, on the United States' Courts. There is no evidence in the record, that the state practice was ever adopted by the Court, and "*the note* was permitted to be read in evidence, under the Act of Ohio." See Wayman and another *vs.* Southard and another, 10 *Wheat.* 1. Admitting the Circuit Court might, under the authority to establish its practice, adopt by written rules, or otherwise, the practice in existence at the time of the act of adoption in the state Courts, the Court was not empowered to incorporate into its practice by *one* Act of *prospective* regulation, whatever might be the *future* practice of the state Courts. This would be not to exercise the judicial functions intrusted to the Court—but to transfer them to the state authorities. An Act of Congress adopting the state practice in existence at the time of its passage, is valid; but an Act prescribing such rules of practice as the state legislatures might in future enact, would be unconstitutional, as it would transfer to the states, the powers vested by the Constitution in Congress. If, then, the Court could not, in the *active* exercise of its powers, establish the future

state practice, much less could the *passive* acquiescence of the Court, in laws and rules of practice enacted from time to time by the state, establish it as a *fundamental* and *constitutional* rule that future state regulations should thereby become a part of the Circuit Court practice. In the present instance, the statute had never received the express sanction of the Court, was introduced and followed up by the United States Bank alone, had never been contested, and always used *sub silentio*.

The Act of Ohio was not passed until after the note was discounted. The Act established a rule of property, construction or evidence, rather than a rule of practice, and therefore could not be applied to a contract entered into before its passage. It was such a rule, as is referred to in 34 *sect. Jud. Act, United States, chap.* 20.

In general a demand is necessary on the drawer to charge the endorser. It may be dispensed with when the note is payable at the holders; and its place supplied by proof, that the holder was present, ready to receive payment, and the account of the drawer inspected, and no credit found in his favour. United States Bank *vs.* Smith, and the cases there cited, 11 *Wheat.* 171. This is the English rule, 2 *H. Black.* 509, and this Court has strongly intimated an opinion in favour of its correctness. No case—not the cases in *Mass. Rep.*, cited 11 *Wheat.* 171, go the length to waive proof that the holder was present at the time and place ready to receive payment. The charge of the Court did not come up to the rule. "If the jury were *satisfied*, from the evidence the note was in bank, and not paid when it came to *maturity*," the record purports to contain all the evidence in the case, and none was exhibited of the non-payment of the note. Agreeably to the charge, it would be sufficient for the plaintiffs to prove the note in bank, at its maturity, without any proof that it was then unpaid; because there was no proof of the non-payment of the note in the case, and *besides*, proof ought not to be required of a negative, *that* the note was *unpaid*. Indeed it is impossible to give positive proof of non-payment. In this case, as in all other cases whatsoever, the jury must be satisfied that the note was unpaid, when it came to maturity, or render a verdict for the defendant. Of this they would be satisfied, without positive proof. Non-payment is presumed, until payment is proven. If, therefore, the jury were satisfied the note was in bank, unpaid, when it came to maturity, a verdict should not have been passed for the plaintiffs, unless they were also satisfied a demand had been made, or excused, or dispensed with. The non-payment might have grown out of the absence of the holder, at the time and place limited for the payment. To charge an endorser, affirma-

tive proof must be exhibited of a demand, or of facts sufficient to excuse or dispense with it. All the books say this, and none assert that proof of a note's being in bank, and unpaid at its maturity, is such excuse or dispensation; much less that the presumption of non-payment, from the absence of proof of payment, supersedes its necessity, and supplies its place. The doctrine of the charge, when analyzed to its last result, and applied to the evidence in the case, is, that proof the note was in bank when it came to maturity, will charge the endorser; and this without a demand, or the evidence of any facts supplying or excusing its want.

The jury should have been instructed, they must be satisfied by affirmative proof the notice was put in the post-office, on the day after the demand, in season to go by the mail next succeeding the day of demand. Proof barely, that it was put in the post-office on that day, without affirmative proof it was there in season to go by the next post, was insufficient. Lenox *vs.* Roberts, 2 *Wheat.* 373. In Darbyshire *vs.* Parker, 6 *East*, 3, Lord Ellenborough says the rule as laid down originally in Marius, is, the notice must be sent by the next post. In one word, it is the *next* post, and not the *next* day. Due diligence consists in placing the notice in the office before the post next after the last day of grace leaves town—and not in placing it there, on the *day* next after the last day of grace. This, although on the next *day*, might not be in time for the next mail; and due diligence must be proven, affirmatively, by the plaintiffs. The record shows the plaintiffs did prove the notice was put in the office on the next day, but not whether in season for the next mail; the record likewise shows they did not attempt to prove this, as it professes to contain all the evidence exhibited on the trial.

He then went into a minute examination of the instructions asked, and charge given, comparing them with the testimony; to show the Court erred in the instructions refused, and those given, relative to the discount of the note, and the application of its proceeds, if a discount was made.

For the defendants in error, it was argued by Mr. Sergeant, upon the first bill of exceptions—that the provision of the Act of the state of Ohio, must be regarded either as a "law of the state," furnishing a "rule of decision" under the 34th section of the Judiciary Act of 1789, or as a mere rule of practice. He would not say it was of the former description, though that position would perhaps be supported by the authority of 3 *Dall.* 344, and 3 *Dall.* 425. It might be deemed in effect an enactment, that *quoad hoc* the contract should be considered a joint contract, for the purpose of remedy. In Pennsylvania, where there is no Court of Chancery, ejectment may be maintained upon an

(Fullerton et al. vs. The Bank of the United States.)

equitable title. Not that an equitable title is a legal title, in general, but only that it is a legal title for the purpose of maintaining the action. This has been in part adopted in the Federal Court in that District, as the law of the state. Upon the same principle, the law of Ohio, would seem to be a rule of decision. If so, it would be obligatory upon the Circuit Court. But this it was not necessary to affirm; for, if it was a "rule of practice," the Court had power to adopt it, and it is quite clear that it had been adopted, though there was no written rule on the subject. So that, either way, it was properly applicable to the case, and there was no error in applying it. As a beneficial, remedial law, it was well worthy of adoption.

Upon the construction of the Act, it was argued, that taking the whole of the section together, it was the obvious intention of the legislature to give one action against the drawer *and* endorsers. The latter part of the section was irreconcilable with any other intention. Besides, it is necessary to make sense of the first part of the section itself. Otherwise construed, that is, disjunctively, the effect would be to give a joint action against drawees. But a joint action might be maintained against drawees without the aid of an Act of the legislature. The Court would not incline to impute needless legislation.

If this was the true construction, and the Act gave a joint action, or, *quoad* the remedy, considered the contract as joint, it would leave the action, when brought, upon the same footing and subject to the same rules as all other actions upon joint contracts, unless otherwise provided by the Act. Does a joint action abate by the death of one of the defendants? Certainly not. Is there any thing in the Act which declares that this action shall abate in that event? It is clear that there is no such provision; such a provision would have been inconsistent with the obvious design of the Act; for how would the multiplication of suits be avoided by declaring that the action should abate upon a contingency of no importance to the merits, and the plaintiff in that case be compelled to bring several suits? It would be derogatory to the intelligence of the legislature, to impute such an intention. There was nothing to warrant it, either in the words or spirit of the Act.

Upon the second bill of exceptions, it was argued—1. That the nature of the case was apparent from the record, and the effort of the defence appeared to have been, to give it a technical complexion different from the reality. From a list in the record it would be seen that the note in question was one (the last) of a series of notes, beginning in the year 1817, with the same names, but not always in the same order, discounted by the office of the Bank of the United States, at Cincinnati. This note was put into bank as a renewal, for the precise purpose,

manifestly known to all the parties, of applying the proceeds to the payment of the next preceding note. It was discounted on that condition, and on no other. The defendants below were interested in the condition, for their names were all upon the prior note, which must have been protested but for the payment by means of this discount. Of the fourteen instructions required, (most of them now abandoned) it will be seen, that the greater part, in some shape or other, aimed to work out a conclusion, (contrary to the truth of the case,) that the proceeds of the discount were to be placed to the credit of the last endorser, and the preceding note to remain unpaid. Upon that subject, the charge of the Court was clear and satisfactory, and to the full as favourable to the defendants as they could reasonably ask, leaving it to the jury as a matter of fact to decide, whether from the evidence in the case it was not proved that the application of the proceeds was made with the *consent* of the last endorser. The fact of his *consent*, the jury have, therefore, found. For this, the counsel referred to the charge.

2. As to proof of demand, the charge of the Court, (though there seems to have been no dispute on that point below,) was in these words: "The jury ought to be satisfied that the note had been discounted by and became the property of the bank; that *it was in bank and not paid when it came to maturity.*" The note being payable at the bank, and the jury having found that it was in bank, and not paid when it came to maturity, nothing more could be necessary.

3. Upon the point of notice, the charge of the Court was, as it was understood, in precise conformity with what the counsel for the plaintiff in error required. This was the natural, and the grammatical interpretation of the language used by the learned Judge—"succeeding" referred, as its antecedent, to "the last day of grace." Thus understood—and if there had been ambiguity, it was the duty of the counsel below to ask for a more precise instruction at the time—the charge is, that the notice was to be in the post-office in time to go by the mail following the last day of grace; and this the plaintiff in error insists it ought to be. As to the fact, whether there was a mail on the following day, and at what hour, there was no evidence.

It is unnecessary to state the arguments more at large, as the opinion of the Court goes so fully into the case.

Mr. Justice JOHNSON delivered the opinion of the Court.—

This cause comes up from the Circuit Court of Ohio, on a writ of error. The record exhibits a judgment recovered by the defendants here, against the plaintiffs, in an action for money lent

and advanced. The plea was *non assumpsit*, with notice of a discount, and a verdict for plaintiff below.

The errors assigned arise upon various bills of exception, the first of which was taken to the evidence offered to maintain an action, in these words, "The plaintiff in support of his action, offered in evidence the following promissory note drawn by Isaac Cook, and endorsed by Humphrey Fullerton, John Waddle and John Carlisle."

"$4000 *Cincinnati, February 1st*, 1820.

Sixty days after date, I promise to pay John Carlisle, or order, at the office of discount and deposit of the Bank of the United States at Cincinnati, four thousand dollars, for value received.

(Signed) ISAAC COOK.

Endorsed—*John Carlisle, John Waddle, Humphrey Fullerton.*"

"To the introduction of this evidence the defendant by his counsel objected, as evidence of a several contract of the drawer and each of the endorsers on the note, and not of any joint undertaking or liability of the defendants, which objection was overruled by the Court, and the note permitted to be read in evidence, under the Act of the general assembly of Ohio, entitled, 'An Act to regulate judicial proceedings, where banks and bankers are parties, and to prohibit the issuing of bank bills of certain descriptions,' passed 18th of February 1820, to which decision the counsel excepted."

Cook, it appears, was originally made a party defendant to the action, but died pending the suit; the plaintiff suggested his death on the record, and went to trial against the remaining three defendants.

In order to understand the bearing which the instruction moved for has upon the cause, it is necessary to remark, that the state of Ohio was not received into the Union until 1802; so that the process Act of 1792, which is expressly confined in its operation to the day of its passage, in adopting the practice of the state Courts into the Courts of the United States, could have no operation in that state. But the District Court of the United States, established in the state in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full Circuit Court jurisdiction, with power to create a practice for its own government.

The District Court of Ohio, it appears, did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state Courts; or in effect adopted by a single rule, the state system

of practice, in the same mode in which this Court, at an early period, adopted the practice of the King's Bench in England. So that when the seventh Circuit was established, in the year 1807, the judge of this Court, who was assigned to that Circuit, found the practice of the state Courts adopted in fact into the Circuit Court of the United States.

It has not been deemed necessary to make any material alterations since; but as far as it was found practicable and convenient, the state practice has, by an uniform understanding, been pursued by that Court without having passed any positive rules upon the subject. The Act of the 18th February 1820, alluded to in the bill of exceptions, was a very wise and benevolent law, calculated, principally, to relieve the parties to promissory notes from accumulated expenses; its salutary effects produced its immediate adoption into the practice of the Circuit Court of the United States; and from that time, to the present, in innumerable instances, suits have been there prosecuted under it. The alteration in practice, (properly so called) produced by the operation of this Act, was very inconsiderable, since it only requires notice to be given of the cause of action by endorsing it on the writ and filing it with the declaration, after which the defendants were at liberty to manage their defence, as if the note had been formally declared upon in the usual manner.

It is not contended that a practice as such, can only be sustained by written rules; such must be the extent to which the argument goes, or certainly it would not be supposed, that a party pursuing a former mode of proceeding, sanctioned by the most solemn acts of the Court, through the course of eight years, is now to be surprised and turned out of Court, upon a ground which has no bearing upon the merits.

But we are decidedly of opinion, the objection cannot be maintained. Written rules are unquestionably to be preferred, because their commencement, and their action, and their meaning, are most conveniently determined; but what want of certainty can there be, where a Court by long acquiescence has established it to be the law of that Court, that the state practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. Such we understand has been the course of the United States Court in Ohio, for twenty-five years past. The practice may have begun and probably did begin in a mistaken construction of the process Act, and then it partakes of the authority of adjudication. But there was a higher motive for adopting the provisions of this law, into the practice of that Court; and this bill of exceptions brings up one of those difficult questions, which must often occur in a Court in which

the remedy is prescribed by one sovereign, and the law of the contract by another. It is not easy to draw the line between the remedy and the right, where the remedy constitutes so important a part of the right; nor is it easy to reduce into practice the exercise of a plenary power over contracts, without the right to declare by what evidence contracts shall be judicially established. Suppose the state of Ohio had declared that the undertaking of the drawer and endorser of a note, shall be joint and not several, or contingent; and that such note shall be good evidence to maintain an action for money lent and advanced; would not this become a law of the contract? where then would be the objection to its being acted upon in the Courts of the United States? Would it have been prudent or respectful, or even legal, to have excluded from all operation in the Courts of the United States, an Act which had so important a bearing upon the law of contracts, as that now under consideration? An Act in its provisions so salutary to the citizen, and which, in the daily administration of justice in the state Courts would not have been called upon otherwise than as a law of the particular contract; a law, which as to promissory notes introduced an exception into the law of evidence, and of actions. It is true, the Act in some of its provisions, has inseparably connected the mode of proceeding, with the right of recovery. But what is the course of prudence and duty, where these cases of difficult distribution as to power and right present themselves? It is to yield rather than encroach; the duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur, in which the maintenance of principle, and the administration of justice according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our Courts must do their duty; but until then, it is administering justice in the true spirit of the Constitution and laws of the United States, to conform, as nearly as practicable, to the administration of justice in the Courts of the state.

In the present instance, the Act was conceived in the true spirit of distributive justice; violated no principle; was easily introduced into the practice of the Courts of the United States; has been there acted upon through a period of eight years; and has been properly treated as a part of the law of that Court. But, it is contended that it was improperly applied to the present case, because the note bears date prior to the passage of the law; and this certainly presents a question which is always to be approached with due precaution, to wit, the extent of legislative power over existing contracts.

But what right is violated, what hardship or injury pro-

duced, by the operation of this Act? It was passed for the relief of the defendant, and is effectual in relieving him from a weight of costs, since it gives to the plaintiff no more than the costs of a single suit, if he should elect to bring several actions against drawer and endorser. Nor does it subject the defendants to any inconvenience, from a joint action; since it secures to each defendant, every privilege of pleading and defence of which he could avail himself if severally sued. The Circuit Court has incorporated the action with all its incidents into its course of practice; and having full power by law to adopt it, we see no legal objection to its doing so, in the prosecution of that system, upon which it has always acted. It cannot be contended that the liabilities of the defendants under their contract, have been increased, or even varied; and as to change in the mere form of the remedy, the doctrine cannot be maintained, that this is forbidden to the legislative power or to the tribunal itself, when vested with full power to regulate its own practice.

The next bill of exceptions has relation exclusively to the discount. It sets out a great deal of evidence, and sixteen specifications, if they may be so called, of the prayers asked of the Court by the defendant's counsel; the whole making out this case. It appears that in December 1817, Isaac Cook's note, with these endorsers upon it, was discounted at the bank of Cincinnati, and renewed every sixty days down to February 1st 1820. It commenced at $6000, and in September 1818 was reduced to $4000, for which amount it was renewed uniformly down to the last date. In its origin, one M'Laughlin's name was also on the paper, and sometimes he, and sometimes Cook, was the last endorser, until March 1819, when Cook was uniformly the last endorser down to the date of the present note. The proceeds of the successive renewals, were of course credited to him, and passed to the payment of the preceding note.

But on this note Fullerton stands as the last endorser, and the proceeds were credited to him, and Cook's note of the preceding date was charged to Fullerton's account without his check; thus balancing the credit which the discounting of the last renewal gave to Fullerton on the books of the bank. The note so charged was of course not protested, and thus Fullerton and his co-endorsers escaped payment of that note; and now they propose to escape the payment of this, by insisting that without a check from Fullerton, authorizing the application of the proceeds as credited to him, to the payment of the previous note, the bank is still indebted to him to that amount. This is an ungracious defence, and one which no Court of justice can feel disposed to sustain. To repel it, the plaintiffs introduced witnesses to prove, that this note was expressly discounted in or-

der that the proceeds might be applied to the previous note; and would not have been discounted otherwise; and contend, that the bank, having the fund in hand to pay itself, had a right so to apply it without a check, upon the ground of implied assent. With a view to that question, the defendants below have introduced thirteen out of sixteen of their prayers. They all go to maintain the single proposition, that Fullerton, as last endorser, was entitled to credit for the proceeds of this note, and is still entitled, if they have not been legally applied to the payment of the note which preceded it.

The remaining three prayers, to wit, the 13th, 14th, and 15th, raise a question on the sufficiency of the demand on the drawer, and of the notice of non-payment to the endorser, and the proof introduced to establish both facts.

The entry in the record on the subject of the charge to the jury, is in these terms. "But the Court instead of the foregoing instructions as asked, charged and instructed the jury, that to enable the plaintiffs to recover, the jury ought to be satisfied from the evidence that the note had been discounted by and become the property of the bank; that it was in the bank and not paid, when it came to maturity; that due notice of the protest and non-payment, had been given to the parties, and that such notice had been put into the post-office the day after the last day of grace in time to go by the *succeeding* mail; that every note discounted in bank, was *prima facie* to be regarded as a business note, and that when such notes were discounted, generally and regularly, the proceeds of the note should be carried to the credit of the last endorser, and paid to his check; that the printed and published rules of the bank, ought in the absence of other testimony to be considered as regulating the course of business of the bank; but that if the jury were satisfied from the evidence, that a practice and course of business in the office of discount and deposit in Cincinnati, had prevailed and was known to defendants, and that the note in question had been discounted and treated in all respects, according to such practice and course of business, but not according to the printed rules, the plaintiffs had a right to recover. That the bank had not a right to apply the proceeds of the note contrary to the understanding and directions of the last endorser, or to any other use than the use of the last endorser, without his consent; but that if the jury were satisfied from the evidence, that according to the custom and practice of the bank in the case when a new note was put into the bank for the purpose of renewing and continuing a former loan or discount, the check of the last endorser was sometimes required, and sometimes dispensed with, and that in the latter case, it was the practice to file away the old note as a check; and that, if the note sued upon had been

discounted and treated in the latter manner, with the consent of the parties to it, the plaintiffs had a right to recover, and that such consent may be inferred and found by the jury, from the facts and circumstances given in evidence, without direct or positive proof, if in the opinion of the jury the facts and circumstances proved, warrant such inference. That if the jury find the note was not discounted, the plaintiff cannot recover; or if they find that it was discounted, but the proceeds remain in the bank carried to the credit of the last endorser, and not drawn or applied with his consent to any other purpose, the money may and ought to be set off against the note; but if they find, that the note sued on was put into bank for the purpose of renewing a former note or loan, and for no other purpose, and with the understanding of all the parties, that if discounted the proceeds could and would, by the course of business in the bank, be applied solely to the discharge of the former note, and that they had been so applied, and the old note retained, and written off as a check, by the bank; that the plaintiffs ought to recover."

The exception taken is, to refusing to give the instructions as asked, and to giving them in the form in which they were propounded to the jury. And the question is whether the instruction given covered the whole ground of the instructions prayed for, and were legally correct, in the form in which they were rendered.

We are of opinion they cover the whole ground taken by the defendants, or at least as far as they had a right to require. This will be obvious from a simple analysis of the charge. The propositions which it imports, will be examined in their order. The first is upon the sufficiency of the demand, and the law laid down on this point is, "that on a note made payable at a particular bank, it is sufficient to show, that the note had been discounted and become the property of the bank, and that it was in the bank, not paid at maturity."

Nothing more than this could have been required of the Court; for the positive proof that the bill was *not paid*, will certainly imply that there were no funds of the drawer there to pay it. The fact could not have been made more positive by inspection of the books. The charge is perhaps too favourable to the defendants, since modern decisions go to establish, that if the note be at the place on the day it is payable, this throws the *onus* of proof of payment upon the defendant. (4 *Johns.* 188.) This is more reasonable than to require of the plaintiff the proof of a negative, and comports better with the general law of contracts.

The next instruction is, in the language of the Court, "that notice of the non-payment and protest, should have been given to the endorser through the medium of the post-office, the day

after the last day of grace, in time to go by the succeeding mail."

The defendant's counsel, in arguing on this part of the instruction, insisted much on the obligation on the plaintiff to establish definitively and positively, that the notice given was in time to go by the next mail; but has not adverted to his own omission, in not putting into the case evidence that there was a mail established from Cincinnati, to the place of the defendant's residence. Yet, if the jury might be left on this point, to take that fact upon notoriety, or personal knowledge, it would be difficult to maintain that they might not, on the same grounds, find the minor fact, that the notice deposited in any part of the business hours of that day, would be in time for the mail ensuing the third day of grace. It is argued that the language used by the Court on this point is equivocal, and may have led the jury to suppose, that sending the notice by the mail which *succeeded the day after the last day* of grace, was sufficient. But we think the construction is forced. The words are, "the day after the last day of grace, in time to go by the succeeding mail." Succeeding what? obviously the last day of grace, otherwise there might be no necessity for putting it in the office, until the second day after the last day of grace, whereas the necessity of putting it in on the first day after, is expressed in the charge.

With this signification it was rather more favourable than need be given, since the mail of the next day may have gone out before early business hours, or no mail may have gone out for several days.

The residue of the charge relates to the application of the proceeds of this note, to the previous note without the check of the last endorser; and this also, we think, embraces all the defendants asked, and is as favourable as the law would sanction. It admits, that this should be regarded as a business note, that the proceeds should have been passed to the credit of the last endorser, and should not have been applied otherwise than by his assent; but it then goes on to assert, what surely could not be controverted, that with the assent of the last endorser, the money, instead of being passed to his credit might be otherwise applied; that with his consent it might be applied to the satisfaction of another note, for which he was endorser, without his checking for the amount; and that his consent may be implied, from circumstances, as all other facts may be.

The jury have found then, that with his consent it was so applied, and the evidence fully bore them out in their finding; if competent, it was all the law requires.

It may be proper to observe that every discount is in the nature of a cross-action, and if the discount filed in this case were

thrown into the form of an action, it would be for money had and received to defendant's use.

The merits of this defence need only be tested by the law which governs that action, to make it clear that the evidence would not sustain it. It goes in fact to show, that in what are called renewals of bank loans, the lending is qualified and not absolute; that when credit is given and money advanced upon a note of that description, it is not an advance on general account, but only for the purpose of a specific application. Any act done by the bank, therefore, whatever be the mere form, if it have for its end the carrying of the contract into effect, in its true spirit and intent, must be binding upon all the parties to the contract. Nothing more is affirmed in this charge or verdict.

One general objection was taken in argument to the instruction given, importing a charge of inconsistency, inasmuch, as although it admits the note to be a business note, as it is called, and therefore to be passed to the credit of the last endorser, it permits it to be treated as an accommodation note, in allowing it to be passed to the credit of the drawer. But if this were strictly the fact, what defence does it afford to the action, if such were the agreement, and the real understanding of the parties? In strictness, however, it was not passed to the credit of the drawer alone, for in the progress of the ruinous system of loans, which prevails over the country, the note discounted as the renewal of an accommodation note, cannot be called a business note, nor can it in correctness be predicated of such a note, that it is passed to the credit of the drawer alone, when the last endorser has in effect an equal relief from the application of the proceeds.

We do not deem it necessary to consider a question commented upon in argument, by the counsel for the bank, and perhaps glanced at by the opposite counsel, whether this note was not void as an accommodation note, under the rules of the bank, because not secured by a deposit of stock.

No one of the exceptions raises the question, and we should think it injustice to the counsel for the plaintiffs here, to suppose that he intended to raise it.

Judgment affirmed, with costs.

JAMES M'DONALD, APPELLANT, *vs.* FREEMAN SMALLEY, AND OTHERS, (IN ALL FORTY.)

Where the record from the Court below, contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees, were willing to submit, upon argument, the whole case to the final decision of the Court; but it appeared that the Circuit Court of Ohio had not decided any question, but that which had been raised upon the jurisdiction of the Court, the counsel were directed by this Court to argue the point of jurisdiction only. {621}

It cannot be alleged, that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the Courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. {623}

M., a citizen of Ohio, apprehensive his title to lands in that state could not be maintained in the state Court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of $1100, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the Courts of the United States, but would fail in the Courts of the state. The property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done. The plaintiff in error, after the land was conveyed to him, gave his bond to make a quit claim title to the land, on condition of receiving $1000; held that the title acquired by the purchaser, gave jurisdiction to the Courts of the United States. {623}

The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity. A Court cannot enter into the consideration of those motives, when deciding on its jurisdiction. {624}

In a contract between a mortgagor and mortgagee, being citizens of different states, it cannot be doubted, that an ejectment, or bill to foreclose, may be brought in a Court of the United States, by the mortgagee residing in a different state. {624}

The rules which govern the practice of the Circuit Courts in Chancery, have been prescribed by this Court; and ought to be observed. {625}

THIS was an appeal from the Circuit Court of Ohio, by the complainant in that Court, on a bill filed in the Chancery side of the Court; the object of which was, through the aid of that Court, to obtain a conveyance of a tract of land, situated in the state of Ohio.

The complainant, a citizen of the state of Alabama, derived title under a conveyance from Duncan M'Arthur, a citizen of Ohio; and the only point decided in the Circuit Court, was upon the question of jurisdiction. The Circuit Court dismissed the bill, for want of jurisdiction; and the complainant appealed to this Court.

(M'Donald vs. Smalley et al.)

Before the argument commenced, the counsel for both parties asked instructions of the Court upon the question, whether, as the record contained the whole of the proceedings in the cause, and exhibited all the matters either party required for a final disposition of the case, in this Court, upon all the points in controversy, this Court would permit the argument to go to the whole case, so that a decree could be given here upon the whole case; or, whether, an opinion upon the jurisdiction only having been given in the Circuit Court, the argument should be confined to that question. The Court having advised upon the subject, directed the counsel to argue the point of jurisdiction only, as no other than that had been decided in the Court from which the appeal had been taken.

In the Circuit Court of Ohio, the defendant suggested, that M'Donald, the complainant in the bill, was not a citizen of Ohio; and according to a practice in the Courts of the state of Ohio, under the authority of a law of that state, interrogatories were exhibited to the complainant, to which answers were given. This law was passed subsequent to the Act of Congress, establishing the judiciary system, and was admitted not to be authority in the Courts of the United States. The facts stated by the complainant, in answer to those interrogatories, with other testimony, furnished the ground taken against the jurisdiction of the Court.

On the 14th November 1823, Duncan M'Arthur conveyed, by deed of indenture, the land in controversy, to the complainant; the consideration expressed in the deed being 1100 dollars, the amount of a debt he owed to the complainant, for land purchased from him. In reply to the interrogatory "whether he was the beneficial owner, or was prosecuting the suit for the benefit of some resident in Ohio; and whether he is the real prosecutor of the suit, and was so at its commencement, or whether his name was used for the benefit of a citizen of the state of Ohio?" the complainant answered, by referring to a letter from Duncan M'Arthur to him, dated July 18th 1823. In that letter, Duncan M'Arthur offers to give the land in question, 1266 acres, alleged to be worth five dollars per acre, to pay a debt of 1100 dollars; suggests that the title is good, if prosecuted in the Federal Court; "but state Judges do not understand land causes, and a claimant in the military district, might as well toss up heads and tails, as sue in a state Court." It contains also this suggestion; "should you accept this offer, and not wish to prosecute the claim yourself, you can make something handsome, I have no doubt, by selling it to some of your neighbours;" and it concludes with offering "any assistance in my power, should

a suit be brought for recovery of the land in the Circuit Court."

He also stated, in his answer, that the deed under which he claimed, was executed for the purpose of giving jurisdiction to the Court of the United States; because he believed that Court safer than any other in the state of Ohio; that the contract was made by letter, of which he had not retained a copy; and, that at the time the deed was "written," there was no special agreement between him and M'Arthur, but, perhaps, propositions by letter. "I give my bonds to a third party for a quit claim title to said lands, on condition of their paying me 1100 dollars."

The complainant insisted, that the deed from M'Arthur, conveys to M'Donald such a title as will enable him to sustain the suit in a Federal Court;—that it is sufficient, if he *has any interest*;—that by accepting the deed, M'Donald has been paid his debt, and though he may be only mortgagee, he may sue in this Court.

The respondents contended, that the answer of M'Donald, shows that he is not the owner of the land; and his manner of answering, leaves no doubt, but that the owner is a citizen of Ohio, and that the jurisdiction of the Court, therefore, cannot be maintained.

Mr. Baldwin, and Mr. Dodridge, for the complainant.—

It is evident, that the complainant held the land, and it was not material how he held it. He had an interest in the land, and was a citizen of Alabama. It is not necessary that a party to sue in the Courts of the United States, shall be the sole owner, if he is beneficial owner of a part of the land; if he has any interest in the lands, it is sufficient. The class of cases decided in the Circuit Court of Pennsylvania, by Mr. Justice Washington, has established the principle. Robert Brown's lessee *vs.* Brown, 1 *Wash. Rep.* 429. Here the interest in the land is certainly to the extent of the debt; and the Court will sustain the jurisdiction, although the interest may not be commensurate with the whole of the land. It is important and necessary, and it was in the view of the framers of the Constitution of the United States, that their tribunals should be opened to those whom prejudice, or unjust, and unconstitutional legislation, in the states, might prevent from maintaining their rights in the Courts of the states, and the Courts of the United States should favour such appeals. Titles may, and are sometimes bad in a state, before a state Court, which are perfect under the decisions of the national Courts. Huidekoper's lessee *vs.* Douglas, 1 *Circuit Court Rep.* 258. Mr. Dodridge also referred to cases, similar in principle, decided in the Courts of Virginia.

(M'Donald vs. Smalley et al.)

Mr. Hammond, for the appellees.—

The inference to be drawn from the decisions of the Courts of Pennsylvania, is different from that which the complainant's counsel deduces. The interference of the Courts of the United States in relation to titles to lands, so as to regulate them differently from the laws of the state, is to be deprecated; such property should be held according to the decisions of the Courts of the state.

The complainant has nothing but a mortgage interest in the land, and such an interest cannot give jurisdiction to the Courts of the United States.

The engagement to give a quit claim deed, coupled with the absence of proof to show that the deed to be made was to another person than M'Arthur, authorizes the assertion that the whole arrangement was one intended only to aid M'Arthur in bringing his title before a Court of the United States; and such a proceeding cannot be sustained.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This suit was instituted in the Circuit Court of the United States for the seventh Circuit, and district of Ohio, to obtain a conveyance of a tract of land, lying in what is termed "the military district;" claimed by the complainant under a patent, younger than that under which it is held by the defendants. The complainant is a citizen of Alabama, and claims the land under a conveyance from Duncan M'Arthur, who is a citizen of Ohio. The defendants objected to the jurisdiction of the Court; and after hearing the parties upon this point, the Court dismissed the bill, being of opinion that its jurisdiction could not be sustained. From this decree, the complainant has appealed, and the cause is now before this Court on the question of jurisdiction.

The bill states the complainant to be a citizen and resident of the state of Alabama, and the defendants to be citizens and residents of the state of Ohio. It has not been alleged and certainly cannot be alleged, that a citizen of one state, having title to lands in another, is disabled from suing for those lands in the Courts of the United States, by the fact, that he derives his title from a citizen of the state in which the lands lie: consequently, the single inquiry must be, whether the conveyance from M'Arthur to M'Donald was real or fictitious?

The transaction, as laid before the Court, appears to be this; M'Arthur was apprehensive that his title could not be sustained in the Courts of the state, in which alone he could sue; and being indebted to M'Donald in the sum of $1100, offered to sell and convey to him the land in controversy, in payment of

this debt. The letter in which this offer was made, expresses the opinion that his title was good, and would most probably be established in the Courts of the United States, but would fail in the Courts of the state. He estimates the property as being worth much more than the sum he is willing to take for it, but in consequence of the difficulties attending the title, he is willing to convey it in satisfaction of the debt. He suggests, that if M'Donald should be disinclined to engage in the controversy himself, he might make an advantageous sale to some of his neighbours, who might be disposed to emigrate to Ohio; and offers to render any service in his power to the proprietor of the land, in the prosecution of the claim in the Courts of the United States.

The contract was concluded by a letter, written in answer to that which has been stated, of which the said M'Donald retained no copy. There was no special agreement between the plaintiff and M'Arthur when the deed was written, but perhaps some proposition by letter. He gave his bond to a third party for making a quit claim title to the land, on condition of receiving from him eleven hundred dollars.

This testimony, which is all that was laid before the Court, shows, we think, a sale and conveyance to the plaintiff, which was binding on both parties. M'Donald could not have maintained an action for his debt, nor M'Arthur a suit for his land. His title to it was extinguished, and the consideration was received. The motives which induced him to make the contract, whether justifiable or censurable, can have no influence on its validity. They were such as had sufficient influence with himself, and he had a right to act upon them. A Court cannot enter into them, when deciding on its jurisdiction. The conveyance appears to be a real transaction, and the real as well as nominal parties to the suit, are citizens of different states.

The only part of the testimony which can inspire doubt, respecting its being an absolute sale, is the admission that the plaintiff gave his bond to a third party for a quit claim title to the land, on paying him $1100. We are not informed who this third party was, nor do we suppose it to be material. The title of M'Arthur was vested in the plaintiff, and did not pass out of him by this bond. A suspicion may exist, that it was for M'Arthur. The Court cannot act upon this suspicion.

But suppose the fact to be avowed, what influence could it have upon the jurisdiction of the Court? It would convert the conveyance, which on its face appears to be absolute, into a mortgage. But this would not affect the question. In a contest between the mortgagor and mortgagee, being citizens of different states, it cannot be doubted that an ejectment, or a bill

to foreclose, may be brought by the mortgagee, residing in a different state, in a Court of the United States. Why then may he not sustain a suit in the same Court, against any other person being a citizen of the same state with the mortgagor. We can perceive no reason why he should not. The case depends, we think, on the question, whether the transaction between M'Arthur and M'Donald was real or fictitious; and we perceive no reason to doubt its reality, whether the deed be considered as absolute or as a mortgage.

A question has been made, whether the Circuit Court ought to have noticed the testimony on the conveyance under which the plaintiff claims, because it was brought irregularly before them.

By a law of the state, interrogatories may be propounded by the defendant in his answer, which the plaintiff is compelled to answer as if they had been propounded in a cross bill.

Although this point has become unimportant in this cause, the Court thinks it proper to say, that the rules which govern the practice of the Circuit Courts in Chancery, have been prescribed by this Court, and ought to be observed.

We think there is error in the decree of the Circuit Court dismissing the complainant's bill, and that the same ought to be reversed, and the cause remanded for further proceedings according to law.

This case came on, &c. and was argued on the point of jurisdiction, on consideration whereof, This Court is of opinion, that there is error in the decree of the said Circuit Court dismissing the complainant's bill. It is therefore decreed, and ordered by this Court, that the decree of the said Circuit Court in this cause be and the same is hereby reversed and annulled. And it is further ordered, that the cause be remanded to the said Circuit Court for further proceedings to be had therein, according to law and justice.

DUNCAN M'ARTHUR, PLAINTIFF IN ERROR, *vs.* WESLEY S. PORTER'S LESSEE.

A special verdict was found by the jury, upon which judgment was to be entered according as the opinion of the Court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof. A deed formed a part of a bill of exceptions taken to the opinion of the Court, upon a motion for a new trial; which bill of exceptions, with the said deed, was contained in the record. The Court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it.

THIS case came up by writ of error to the Circuit Court of the District of Ohio, and was argued by Mr. Baldwin, for the plaintiff in error, and by Mr. Ewing, for the defendant in error. The cause was remanded to the Circuit Court in consequence of a defect in the record, and no opinion having been given by the Court upon the points presented and discussed by the counsel, they are omitted.

Mr. Chief Justice MARSHALL delivered the opinion of the Court:—

This was an ejectment in the Court for the seventh Circuit and District of Ohio, in which the jury found a verdict in the following words: "We the jury find the defendant guilty of the trespass and ejectment, in the declaration mentioned, and assess the plaintiff's damages to six cents, which verdict is thus rendered, subject to the opinion of the Court on the question reserved by consent of parties, as to so much of the land in controversy, as is contained in the deed of the sheriff of Ross county, to the said defendant, bearing date the day of 1802, and upon that part of the land included in said deed. If the opinion of the Court on the question so reserved by consent, shall be with the plaintiff, that the said deed is not valid to pass the land therein described, then we the jury find the defendant guilty of the trespass and ejectment in the declaration mentioned, accordingly, for that part also; and if the opinion of the Court thereon shall be in favour of the defendant, that said deed, with the other evidences exhibited as part of said title, is valid to pass the fee to the defendant; then the jury find the defendant not guilty of the trespass and ejectment in the said declaration mentioned, as to that part of the lands and premises in controversy."

This conditional verdict is for the plaintiff, or defendant, ac-

cording to the opinion of the Court on the validity of a deed, with the other evidences exhibited as part of said title. But this deed, and these other evidences of title are not exhibited to the Court, in such manner as to enable us to notice them. A deed does, indeed, form a part of a bill of exception taken to the opinion of the Court, on a motion subsequently made for a new trial. But the Court cannot know, judicially, that this is the same deed which is referred to in the verdict, or what are the other evidences of title which are connected with it. The verdict is too imperfect to enable the Court to render judgment on it.

The judgment of the Circuit Court is therefore reversed, and the cause remanded to the Circuit Court, with directions to set aside the verdict, and to award a *venire facias de novo*.

This cause came on, &c. in consideration whereof, It is the opinion of this Court, that the judgment of the said Circuit Court in this cause is erroneous, because the verdict is imperfect. It is therefore considered and adjudged by this Court, that the said judgment be, and the same is hereby reversed and annulled. And it is further ordered, that this cause be remanded to the said Circuit Court, with directions to award a *venire facias de novo*.

JAMES JACKSON, EX-DEMISE OF LAZY ANDERSON *vs.* JOHN CLARK AND ROBERT ELLISON.

Construction of the Act of Congress passed March 2d 1807, entitled "An Act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated. {634}

The reservation made by the law of Virginia of 1783, ceding to Congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the river Scioto, and Little Miami. It is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The residue of the lands are ceded to the United States, as a common fund for those states, who were, or might become members of the Union, to be disposed of for that purpose. {635}

Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust. {635}

If the right existed in Congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows as a necessary consequence. {635}

If it be conceded that the proviso in the Act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes, itself, a nullity. {635}

Lands surveyed, are under the law as completely withdrawn from the common mass, as lands patented. It cannot be said that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys. They did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times. {638}

ERROR to the Circuit Court of the United States, for the district of Ohio.

The plaintiff brought an action of ejectment, in the Circuit Court of Ohio, to recover a tract of land, situate in Adams county, in the Virginia military district, and state of Ohio. On the trial of the cause, a bill of exceptions was tendered by the plaintiff, to the opinion of the Court upon the admissibility of certain testimony, which was offered by the plaintiff, and which was rejected by the Court.

The facts of the case, with the matters which were the sub-

ject of the plaintiff's exceptions, appear in the opinion of the Court.

The case was argued by Mr. Leonard and Mr. Hammond, for the plaintiff in error, and by Mr. Creighton and Mr. Ewing, for the defendants.

The argument of the counsel of the plaintiff in error, was principally upon these points:—

1. Congress could not rightfully limit the time within which military warrants should be located and surveyed.

2. The Act of Congress, prohibiting locations on lands already surveyed, and declaring any patent which should be issued on such survey void, does not comprehend the survey in this case.

Mr. Leonard and Mr. Hammond, insisted: the proviso of the Act of 2d March 1807, was simply designed to protect *voidable* surveys, not those absolutely void. Before the statute, surveys made in defective locations, or not executed in conformity, were voidable, but might be carried into grant, and the grants issued thereon, were without the aid of the Act, appropriations of the land.

These were the principal evils in the country, demanding legislative interference, and led to the enactment of the statute. And this places all voidable surveys, which might be patented, on the same footing as if they were patented, so far as to prevent subsequent appropriation, but does not cover with its protection, surveys on which grants can never issue.

The authority of the surveyor to make a survey, is derived solely from the warrant; and surveys executed without warrants, are void. This is apparent from all the laws of Virginia relative to the subject, and from the common practice and universal understanding of those laws, and the decisions of the Courts. By the Act of 9th June 1794, now in force, no patent can issue on the defendant's survey.

On the construction of defendants, the proviso will operate as a virtual repeal of that Act, and give such validity to these surveys, as to remove the necessity of obtaining grants; or otherwise, by preventing subsequent locations, vest the land in the United States. The latter construction would be an infringement of the compact between Virginia and the United States, and a refusal to execute it in good faith.

If Congress can limit the time within which locations may be made, they are bound to execute the power with the utmost honour, and not apply a limitation to one part of the district, without extending it to all. Much less are they authorized, under colour of limiting the time, to appropriate the land to their own use. None will presume such ill faith in Congress. The Virginia troops acquired a right, and at the price of blood, to

compensation in land, by the express stipulation of that state. Virginia did not cede the north-west territory to the Union, until the United States engaged to make good the compensation out of the reservation. The faith of two sovereigns, has pledged the military district to these troops.

The whole course of the legislation of Congress, evinces that it was not their design to authorize locations, or surveys, without military warrants, or for more land than is embraced in them. It cannot be supposed, that it was the design of the *proviso* to protect surveys wholly unauthorized, on which grants can never issue; but to protect surveys that are irregular, defective, voidable, and which might be patented. The Act of Virginia protecting old military surveys, is as strongly expressed as the proviso, but has always been held to apply only to those founded upon warrants.

A sale of land by title bond, and location afterwards made, does not vest the purchaser with title in the warrant or entry. The purchaser reposes confidence in the vendor, and if this confidence is misplaced, the purchaser, and not the government, must sustain the loss. The purchaser can look to his bond for indemnity. Massie was then the proprietor, and had the right to elect either of these locations, and by recording a survey of the earlier, he bound himself, and abandoned the latter. The taking out the warrant, and the plots of survey, as on a satisfied warrant, is a solemn act of abandonment. The recorded survey, and not the survey executed on the ground, is protected by the proviso. The recording a survey, after the satisfied warrant with the plots of survey are taken from the office, is a void act. A new entry cannot be held a withdrawal of one prior; or, if so, it cannot be held a withdrawal of a survey recorded when the plot is taken from the office, and especially when not returned, and thus a survey of 553 acres, made on only 403 acres of located warrant, the residue of the 553 acres being surveyed, recorded, the plots taken out of the office, and not returned, is not shielded by the proviso.

He cited, among other cases, Taylor's Lessee *vs.* Myers, 7 *Wheat.* 23. Kerr *vs.* Watts, 6 *Wheat.* 550, Mathie *vs.* Potts, 6 *Cranch*, Taylor and another *vs.* Brown, 5 *Cranch*, Wilson *vs.* Mason, 1 *Cranch*, Hickman *vs.* Hoffman, and Estill's Heirs *vs.* Haret's Heirs, *Hardin's Reports, p.* 81, 82, *of Sneid's printed Kentucky Decisions.* Johnson *vs.* Buffington, 2 *Wash. Rep.*, Holt's Heirs *vs.* Hemphile's Heirs, 3 *vol. Ohio Reports*, and referred to *Swan's Collection of Ohio Land Laws, under the head of Virginia military lands.*

Mr. Creighton, and Mr. Ewing, for the defendants in error, contended.—

In the case presented by the record and bill of exceptions,

the counsel for the defendants insist, that they are protected by the proviso of the Act of Congress of the 2d March 1807, entitled an Act to extend the time for locating Virginia military warrants, for returning surveys, &c.; and subsequent Acts of Congress on the same subject, containing the same proviso; and that the patent obtained by the plaintiff is "null and void."

The United States, under the deed of cession of 1784, from Virginia, held the Virginia military district in trust, for the Virginia claimants. The surplus, subject to sale, as other lands belonging to the United States.

In the execution of these trusts, the Congress of the United States, on the 23d of March 1804, passed an Act limiting locations in the Virginia military district to three years, and five years to execute and return surveys.

The holders of warrants asked an extension of the time. When the Act of the 2d March 1807 was passed, extending the period for making locations and returning surveys, the proviso on which the defendants rely, was introduced, and has been retained in all the subsequent Acts of Congress on that subject.

The power of Congress to limit the period for making locations and surveys in this district, (exercised since the year 1804,) heretofore has never been questioned. In the exercise of an undoubted power, the object and policy of the national legislature in the introduction of the proviso cannot be mistaken, in excluding from location "land for which patents had previously been issued, or which had been previously surveyed." The survey claimed by the defendants, is a subsisting survey, which has never been abandoned or withdrawn, and comes expressly within the doctrine laid down by the Court in the case of Taylor's lessee *vs.* Myers, 7 *Wheat.* 23. "The proviso in the Act of March 2d 1807, which annuls all locations made on lands previously surveyed, applies to subsisting surveys—to those in which an interest is claimed." The Act places surveys on the same footing with patents, for all the purposes of defence in trials at law. A patent is a title from its date, and conclusive against all those whose rights did not commence previous to its emanation. Hoofnagle and others *vs.* Anderson, 7 *Wheat.* 212. In the action of ejectment in Ohio, the parties are never permitted to go behind the patent. The same rule applies under this Act to surveys.

The class of cases referred to, and relied on by the plaintiff's counsel, are cases in chancery, where it is the appropriate duty of the Court to go behind the patent or survey.

Whether a patent can be obtained by the defendants on their survey, will be a question between them and the government,

whenever the government shall make provision to inquire into the claim. It can never be a question between the plaintiff and defendants. It is sufficient for the defendants in this controversy, that they have a *subsisting* survey, *claimed* by them, and that the patent obtained by the plaintiff has been procured in contravention of the positive provisions of the Act, and is "null and void."

If it were admissible to go into the inquiry desired by the plaintiff, it will be seen, that when Nathaniel Massie sold the land in question to the defendants, and at the time he made the entry and survey, he owned 403 acres, part of Leven Powell's warrant, and 150 acres, part of Thomas Goodwin's warrant, making 553 acres, the precise quantity in the entry and survey.

If the objection to the defendants' title exists, as suggested by the plaintiff's counsel, the facts disclosed in the evidence offered by him, present a case where a Court of Equity would give to the defendants ample relief.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This is an ejectment brought by the plaintiff in error, in the Court of the United States for the seventh circuit and district of Ohio, to recover a tract of land lying in the military district.

The plaintiff offered, as his title, a patent from the government of the United States, bearing date the 10th of November 1824.

The defendants then introduced a certified copy of an entry and survey of the lands in controversy, sworn to by Richard G. Anderson, the principal surveyor of the Virginia military district; the survey purporting to have been made on the 10th of October 1796, and recorded on the 15th of April 1812, founded on an entry, bearing date the 19th day of July 1796, for 553 acres of land in the name of Nathaniel Massie, assignee, numbered 2744, and founded upon Leven Powell's warrant, for 2000 acres, No. 3398, and Thomas Goodwin's warrant for 200 acres, No. 1930. It was admitted, that the defendants were purchasers from Massie, prior to the year 1796; entered into possession of the premises under the said purchases, and received a conveyance from him, before the year 1812. It was also admitted, that the plaintiff's entry was made on the 10th of June 1824, and his survey on the 20th of the same month.

The defendant relied on this survey, and on the proviso of the Act passed the 2d of March 1807, entitled "An Act to extend the time for locating Virginia military warrants, &c." This Act annexes the following proviso to the permission it

grants to obtain warrants for military service, and to make locations within the military district:—"Provided, that no locations as aforesaid, within the aforesaid mentioned tract, shall, after the passing of this Act, be made on tracts of land for which patents had previously been issued, or which had been previously surveyed, and any patent which may, nevertheless, be obtained for land located contrary to the provisions of this section, shall be considered as null and void."

To show that the survey set up by the defendants was not protected by the proviso in the Act of Congress, the plaintiff offered to prove, that the warrants on which it was founded were satisfied before that entry was made. For this purpose, he offered in evidence, two entries, amounting to 1597 acres, on Powell's warrant, made in Powell's name the 30th of December 1791, surveyed by Massie on the 3d of January 1792, the survey recorded on the 10th of the same month; plots and certificates taken from the office by Massie, the 11th of July 1795, and a patent issued to him on the 19th September 1799; also an entry for 403 acres, the residue of Powell's warrant, made in the name of Nathaniel Massie, on the 27th of January 1795, surveyed on the 27th December 1796, the survey recorded on the 9th of June 1797; the plot and certificate, together with the warrant supposed to be satisfied, taken out of the office by Massie, on the 14th of June 1797, and a patent issued to his heirs on the 3d of December 1814.

He also offered in evidence, an entry for fifty acres made on Thomas Goodwin's warrant, in the name of John Walker, assignee, the 17th of September 1795, surveyed the 30th of March 1820, and patented on the 19th of November 1825; also an entry for 150 acres, the residue of the said warrant, made on the 16th of June 1795, in the name of the said Massie, surveyed on the 1st of July in the same year; survey recorded the 10th of the same month, and a patent issued to Massie on the 15th of February 1800.

The plaintiff also offered the deposition of Richard C. Anderson, the principal surveyor, who deposed, that the survey of 553 acres, which was given in evidence by the defendants, was illegally made, and admitted by him ignorantly and improperly, to record; and that he had marked the same on the record of his office, "error;" but he does not state the time when this mark was made. He adds, that he had refused to grant a plot, and certificate of survey, being of opinion that the whole of the warrants had been previously satisfied.

The defendants moved the Court to reject the authenticated copies, and testimony aforesaid, as inadmissible evidence; which motion was granted by the Court, upon the ground that the Act of Congress confirmed the survey of the defendants,

(Jackson ex. Clark et al.)

and annulled the plaintiff's patent. An exception was taken to this opinion. A verdict and judgment having been given for the defendants, the plaintiff has brought the cause into this Court by writ of error.

Two points have been made by the counsel for the plaintiff. They contend—

1. That Congress could not, rightfully, limit the time within which military warrants should be located and surveyed.

2. That the Act of Congress, prohibiting locations on lands already surveyed, and declaring any patent which should be issued on such survey void, does not comprehend the survey in this case.

The first point to be considered, is the objection to the limitation of time prescribed by Congress, within which the military warrants granted by Virginia should be located. The plaintiff contends that no limitation can be fixed.

In the October session of 1783, the legislature of Virginia passed an Act ceding to Congress the territory claimed by that state, lying north-west of the river Ohio, under certain reservations and conditions, in the Act mentioned. One of these was, "That in case the quantity of good land on the south-east side of the Ohio, upon the waters of the Cumberland river, and between the Green river and Tennessee, which has been reserved by law for the Virginia troops, on the continental establishment, should, from the North Carolina line bearing in farther upon the Cumberland lands than was expected, prove insufficient for their legal bounties; the deficiency should be made up to the said troops in good lands to be laid off between the rivers Scioto and Little Miami, on the north-west side of the river Ohio, in such proportions as have been engaged to them by the laws of Virginia."

This is not a reservation of the whole tract of country lying between the rivers Scioto and Little Miami. It is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The reservation is made in terms which indicate some doubt respecting the existence of the deficiency, and an opinion that it will not be very considerable. Subsequent resolutions of the Virginia legislature, have added very much to the amount of these bounties. The residue of the lands are ceded to the United States, for the benefit of the said states, "to be considered as a common fund for the use and benefit of such of the United States, as have become, or shall become, members of the confederation or federal alliance of the said states, Virginia inclusive, according to their usual respective proportions in the general charge and

expenditure; and shall be faithfully, and *bona fide*, disposed of for that purpose, and for no other use or purpose whatever."

The government of the United States then received this territory in trust, not only for the Virginia troops on the continental establishment, but also for the use and benefit of the members of the confederation; and this trust is to be executed "by a faithful and *bona fide*" disposition of the land, for that purpose.

We cannot take a retrospective view of the then situation of the United States, without perceiving the importance which must have been attached to this part of the trust. A heavy foreign and domestic debt, part of the price paid for independence, pressed upon the government; and the vacant lands constituted the only certain fund for its discharge. Although, then, the military rights constituted the primary claim on the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view that other object which was also of vital interest. This was to be effected only, by prescribing the time within which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue, which it was then supposed would be considerable, to the other purposes of the trust. The time ought certainly to be liberal. But unless some time might be prescribed, the other purposes of the trust would be totally defeated; and the surplus land remain a wilderness.

This reasonable, and, we think, necessary, construction, has met with general acquiescence. Congress has acted upon it, and has acted in such a manner as not to excite complaints, either in the state of Virginia, or the holders of military warrants.

If the right existed to prescribe a time within which military warrants should be located, the right to annex conditions to its extension follows as a necessary consequence. The condition annexed by Congress has been calculated for the sole purpose of preserving the peace and quiet of the inhabitants, by securing titles previously acquired. We are to inquire, whether the case of the defendants is within it.

2. It has been contended, that the prohibition in the Act of the 2d of March 1807, to make locations on lands which had been previously surveyed, does not extend to the survey of the defendants, because that survey was made on warrants which had been previously satisfied. The word "survey," as used in the law, is not satisfied by the mere circumstance that a chain has followed a compass round a particular piece of ground; but requires that it should be made in virtue of a warrant for the purpose of appropriating land, to which the holder of that warrant is entitled by law. The warrant can be an authority

for surveying and appropriating so much land only, as it professes to grant; and this necessary limitation, could it require confirmation, is confirmed by the Act of the 9th of June 1794, which regulates the manner of issuing patents on surveys for less than the whole quantity of land specified in the warrant. That Act contains a proviso, "That no letters patent shall be issued for a greater quantity of land than shall appear to remain due on such warrants." As patents had issued for the whole quantity of land specified in the warrants on which the survey of the defendants professes to be founded, previous to the entry of the plaintiff, no patent could at that time have been obtained by the defendants; and therefore, the saving in the statute could not have been intended for their survey.

The Court has felt the weight of this argument, and has bestowed upon it the most deliberate consideration.

The Act of the 23d of March 1804, is the first Act which prescribes the time within which the holders of military warrants shall make their locations and surveys. That Act requires that the locations shall be made within three years from its passage. On the 2d of March 1807, the first Act was passed giving a farther time of three years for making locations, and of five years for returning surveys. This Act contains the proviso of which the defendants claim the benefit. In every Act which has been since passed, prolonging the time for making entries and returning surveys on military warrants, the same proviso has been introduced. It was enacted in March 1807, and has continued in force ever since. It constitutes a limitation to the right given by all subsequent laws, to locate and survey military warrants.

If it be conceded, that this proviso was not intended for the protection of surveys which were in themselves absolutely void, it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes itself a nullity. We must therefore inquire, to which class the survey of the defendants belongs.

Nathaniel Massie was probably the proprietor of Leven Powell's whole warrant of 2000 acres, certainly of 403 acres part thereof, when he made the entry under which the defendants claim. He was also the proprietor of 150 acres, part of Thomas Goodwin's warrant. We say he was at that time the proprietor of those warrants, because he made an entry for 403 acres, part of Powell's warrant, in his own name, on the 27th of January 1795, and an entry for 150 acres, part of Goodwin's warrant, in his own name, on the 16th of June 1795; both which entries were afterwards surveyed and patented for himself and his heirs. These two entries amount to 553 acres, the

quantity for which the entry sold to the defendants was made. Being thus the proprietor of both these entries, and of the warrants on which they were founded, he makes an entry in his own name, on the 19th July 1796, for the same quantity of 553 acres. This last entry, the warrants being satisfied if the previous entries remained in force, was inconsistent with the two preceding entries. It ought not to have been made by him nor allowed by the principal surveyor, unless those preceding entries were withdrawn. According to the usage of the office, as stated in Taylor's Lessee *vs.* Myers, *7 Wheat.* 23, Massie had the power to withdraw them. Had he expressed to the Surveyor General his wish to withdraw them, and to re-enter the warrants, his wish would not have been opposed. But, without expressing this wish, so far as the case shows, he made the entry in question. This act was lawful if the two preceding entries were removed; unlawful if they stood. The officers of the government did their duty, if this entry displaced the two which preceded it; but violated their duty, if it had not this effect. Unquestionably, in an office regularly kept, the withdrawal of an entry ought to appear upon the record; but had this office been regularly kept, the last entry could not have been allowed, unless accompanied by a withdrawal of those which were inconsistent with it.

Had Nathaniel Massie transferred his right to the two last preceding entries, previous to the time of making this for the defendants, so that the contest was between purchasers; the prior entries could not have been affected by his subsequent act. But he had not transferred his right to them; the contest, had one arisen, would not have been between purchasers, but between a purchaser, and the wrongdoer himself. Can it be doubted how such a controversy would have terminated? Nathaniel Massie, being the proprietor of 553 acres of military land warrants, enters them on lands which they might lawfully appropriate; afterwards, possessing a perfect right to cancel this entry, and locate the warrants elsewhere, he does locate them elsewhere, and sells this location to a purchaser for a valuable consideration, without notice. It cannot, we think, be doubted that a Court of Equity would at any time, while Massie remained the owner of the prior entries, relieve such purchaser, by annulling the entries which obstructed the title of the purchaser; or decreeing that Massie should withdraw them, or enjoining him from carrying them into grant. Had the plot and certificate of survey, with the accompanying vouchers required by law, been presented by the defendants, previous to the proceedings taken by Massie to obtain patents for himself, a grant would have issued to the defendants. Their survey then, was not an absolute nullity. It might have been supported in a

Court of Equity; and had the defendants, instead of trusting, as they probably did, to Massie for a title, been diligent in the pursuit of it themselves, they might, perhaps, have obtained one from the United States.

This was not a fictitious, but an actual survey, made as early as the year 1796, by a regular officer, for one owning the warrants on which the entry purports to be made, and having at the time, full power to give complete validity both to the entry and survey. No circumstance attended them which could enable a purchaser to detect the latent defect. The survey having every appearance of fairness and validity given to it by the regular officers of the government, is sold, at least as early as the year 1796, to persons who take possession of it, and have retained possession ever since. Why should not the proviso in the Act of Congress apply to the case? The words taken literally, certainly apply to it. "No locations shall be made on tracts of land for which patents had previously been issued; or which had been previously surveyed." Had a patent been previously issued on this very survey, this contest could never have arisen. Does the language of the clause furnish any distinction between the patent and the survey? If it be a survey, there is none. Lands surveyed are as completely withdrawn, as lands patented from subsequent location.

It cannot be said, that the prohibition was intended only for valid and regular surveys. They did not require legislative aid. It was known that the military district abounded with defective entries and surveys, which might be defeated by entries made in more quiet times, with better knowledge of the requisites of law. This clause was introduced for their protection. It was, most truly, an enactment of repose. A survey made by the proper officer, professing to be made on real warrants, bearing upon its face every mark of regularity and validity, presented a barrier to the approach of the location, which he was not permitted to pass; which he was not at liberty to examine. Had the survey been made on land not previously located, it would have been as destitute of validity as it is now supposed to be. Yet it is admitted, that though it should not cover one foot of the location, the land surveyed could not be appropriated by a subsequent locator. The illegality of the survey would not have been examinable by him.

We cannot draw the distinction between such a case and this. Congress does not appear to have drawn it. They are both surveys made by the regular officers on military warrants.

It may be, that the defendants may never be able to perfect their title. The land may be yet subject to the disposition of Congress. It is enough for the present case to say, that as we

understand the Act of Congress, it was not liable to location when the plaintiff's entry was made.

We have not noticed the testimony of the principal surveyor, because we do not think it affects the case. The word "error" was written on the face of the plot, we know not when; certainly after it was recorded, and after the certificate exhibited by the defendant at the trial had been given. It manifests his opinion that he acted improperly in admitting the survey to record, but that opinion cannot affect the case. The great original impropriety was in omitting to require that the previous entries made in the name of Massie, should be withdrawn, expressly, when this entry was made.

This case is not, we think, like Taylor's Lessee *vs.* Meyers, reported in 7 *Wheat.* 23. In that case the owner had openly abandoned his location and survey, and had placed his warrant on other land. In such case, the land was universally considered as returning to the mass of vacant land, and becoming, like other vacant land, subject to appropriation. A person having no interest in the original survey, attempted to set it up against a subsequent locator, under the proviso in the Act of Congress which has been stated. The Court said, "the proviso of that Act, which annuls all locations made on lands previously surveyed, applies to subsisting surveys; to those in which an interest is claimed, not to those which have been abandoned, and in which no person has an interest." This survey has not been abandoned by any person having title to it, and the defendants still have an interest in it.

We think there is no error in the decree, and that it ought to be affirmed.

ROBERT BARRY, APPELLANT, *vs.* GRIFFITH COOMBE, APPELLEE.

The statute of frauds in Maryland requires written evidence of the contract, or a Court cannot decree performance. The words of the statute are "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." {650}.

A note or memorandum in writing of the agreement between parties, is sufficient under the statute of frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, or the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A Court of Equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c. {650}

An examination of the cases will show that Courts of Equity are not particular, with regard to the direct and immediate purpose for which the written evidence of the contract was created. It is *written evidence* which the statute requires; and a note or letter, and even in one case a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute. {651}

Where, in an account stated by the parties, in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit; "*By my purchase of your half, E. B. wharf and premises this day agreed upon between us,* $7578 63;" it was held to be a sufficient memorandum in writing under the statute of frauds of Maryland, upon which the Court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admissions of the defendant in his answer, to show the particular property designated by "*your ½ E. B. wharf and premises.*" {651}

THIS was an appeal from a decree in equity, of the Circuit Court for the county of Washington, against Robert Barry the appellant, upon a bill filed by Griffith Coombe, for the specific execution of a contract for the sale of real estate in the city of Washington, and for the payment of the balance of an account, which it was alleged had been settled and agreed upon by the parties.

The material charges in the bill, and which were brought into the consideration of the Court, by the counsel in argument, were; that various transactions, commencing in 1815, had taken place between the complainant and the defendant, who then resided in Baltimore, together with a certain James D. Barry of the city of Washington, as joint proprietors of a tanyard,

in which the business of tanning and selling leather was carried on; in the course of which, the concern became largely indebted to the complainant, and to other persons; for the payment of which securities had been given. Afterwards, in 1821, the partnership between the defendant and James D. Barry, was dissolved, and the whole of the stock in trade became the property of the defendant; who afterwards continued the business on his own account.

That about the 18th of May 1818, the complainant and the defendant purchased an estate on the Eastern Branch of the Potomac in the city of Washington, upon which were erected a dwelling house, warehouse, and wharf, and which was held by the complainant and the defendant as tenants in common. Large expenditures were made by the complainant for the repairs of the property, and the defendant was considerably indebted to the complainant for his proportion and share of the same.

The bill further charged, that, about September 1820, a settlement of all accounts took place between the parties, upon which the defendant was found in arrears, and admitted himself to be indebted to the complainant, a stated balance of 9,078 dollars 33 cents; and for the purpose of liquidating and discharging the balance, so due by the defendant, a bargain was then concluded for the sale of the defendant's moiety of the said premises, on the Eastern Branch, so held by them in common; for which the complainant agreed to allow him the price of 7,578 dollars 63 cents, to be passed to his credit, in account against the stated balance; the balance of 1,500 dollars still remaining due, the defendant agreed to pay with interest in instalments, in one, two, and three years, and to give his promissory notes for the same; in consideration of which agreement, on the part of the defendant, the complainant agreed to discharge the parties who had been concerned in the tanyard, from the debt due to him, on account of certain endorsements; and to reliquish to the defendant his interest in, and lien upon, leather which he held. Whereupon *the defendant immediately drew up, in his own handwriting, a statement of the said settlement, bargain, and agreement*, in the form of an account between himself *as debtor*, and the complainant *as creditor*, *signed at the beginning with the defendant's name in his own handwriting, and at the foot with the complainant's name in his handwriting:* in which written statement, are set down the heads of the several accounts upon which the said balance of 9,078 dollars 63 cents, was ascertained against the defendant as aforesaid; the credit and deduction of the purchase money, agreed to be allowed the complainant for the defendant's moiety of the said estate and premises on the Eastern Branch, as aforesaid, described in said statement as "your [meaning the de-

fendant's] ½ E. B. [meaning Eastern Branch] wharf and premises;" and expressly stated as purchased by the complainant on the day of the date of said paper, with an express reference to the said agreement between the complainant and the defendant; and lastly, the said balance of 1,500 dollars, remaining due after deducting the credit for the said purchase money as aforesaid, payable by instalments as aforesaid.

The statement of the account, alleged to have been so drawn up, was as follows:—

"*Washington, 27th Sept.* 1820.

"Robert Barry, To G. Coombe,		Dr.
"To amount of J. D. Barry's notes taken up by me, and secured by him in tanyard-stock, and leather, per bill dated 27th Dec. 1819, - - -	$4,209 00	
"Interest on do. to this day—9 Mos. -	184 40	
		$4,393 40
"To bill of leather sent you in June, 1819,	$2,846 50	
"Interest to this date—15 Mos. - -	216 65	
		3,063 15
"To balance due on tanyard-books, (E. E.)	284 25	
"To cart of hay for tanyard, - -	37 37	
"To balance due for supplies to tanyard, per account furnished you, - - -	152 64	474 26
"To ½ expenses of repairs on house and wharf, E. Branch, - - - -	1,145 49	$7,930 81
"Interest, 9 Mos. - - - -	51 52	1,197 01
"Cr.		$9,127 82
"By ½ rent and wharfage, &c. of sundrys, to this day on E. B. wharf, - - - -		49 19
		$9,078 63
"*By my purchase of your ½ E. B. wharf and premises, this day as agreed on between us.*		7,578 63
"Balance due G. Coombe, fifteen hundred dollars,		$1,500 00

"Payable in one, two and three years, with interest.

(Signed,) G. COOMBE."

The bill charged, that this paper, each party having a copy, was, for the purposes of mutual security, delivered to Daniel Carroll, Esq. of Duddington, who was a creditor of the partnership.

It was further alleged, that the complainant went on to do and perform all that he had assumed and undertaken under

the agreement and settlement; that he took possession of the premises on the Eastern Branch, and has laid out and expended large sums of money in the repairs and improvements thereof; and that although he has repeatedly made efforts to obtain from the defendant, a conveyance of the property, so agreed to be conveyed to him by the defendant, it has not been made.

The bill then prays the specific relief to which the complainant alleges himself entitled in equity, under the contract; and the benefit of such a recovery, as he might have at law, by attachment or otherwise, for the debt due to him as stated in the account.

Among the documents contained in the record, is the following letter from the complainant, to the defendant, and which by the affidavit of John P. Ingle, was proved to have been delivered to the defendant on the 5th of April 1822.

Washington City, March 26, 1822.

Mr. ROBERT BARRY.

Sir—It is now time that I should have your final answer, whether you will execute the contract made between us in presence of Mr. Carroll, for the conveyance of your moiety of the house, wharf, and premises on the Eastern Branch, and for the payment and security of the balance due me in money. For this purpose I have authorized Mr. John P. Ingle to call on you in my name, and receive your conveyance, a form of which he will present you, which you will please execute, and acknowledge in due form, so as to make it effectual here. Please also pay to Mr. Ingle the instalment of $500, due in September last, with interest from 27th September 1820. Please also to execute and deliver to Mr. Ingle your two notes for the other instalments, drafts of which he will present you.

I also require of you the surrender of J. D. Barry's draft, endorsed by me for $1000, which had been discounted in the Bank of Washington, and which you promised to take up and release me from. I must notify you, that if you persist in refusing to comply with the terms of your contract, according to your pledged faith in presence of the respectable witness above mentioned, I shall hold you accountable in money, for the whole balance due me according to our settlement, and shall merely hold the house, wharf, &c. which you were to have conveyed to me, as collateral security for the entire balance ascertained by that settlement, and for the expenses since laid out in repairs and improvements of the same, under the faith of your contract.

Respectfully, your obedient servant,

GRIFFITH COOMBE.

(Barry vs. Coombe.)

The defendant, Robert Barry, denies in his answer, the liabilities to which, by the bill of the complainant, he is said to have been under as connected with the tanyard, and the concern with James D. Barry; and, after stating other matters, not necessary to be inserted, admits, in the language of the answer, that in the year 1820, he had a conversation with the complainant about settling their accounts, "including the debt alleged to have been secured by the pretended bill of sale aforesaid, *and the complainant then proposed to purchase from this defendant, his undivided moiety of the lots* and wharf aforesaid, and that the amount of purchase money should be considered as a payment to the complainant, in part of the amount *which he then alleged* was owing to him; *and the defendant, at the request of the complainant*, who alleged the badness of his handwriting as an excuse for making that request, *copied from a written memorandum furnished by the complainant*, the statement of the account referred to, in which the defendant's name was written by him, only for the purpose of stating him as debtor to the complainant, in *compliance with his request, not as signing any contract or agreement.* And that the said statement so written by him, at the instance and request of the complainant, *being signed by him*, was delivered to this defendant, *for the purpose of considering whether, after due examination, he would assent to the terms therein proposed, and was not deposited in the hands of Daniel Carroll, as the complainant alleges. For this defendant declares, that he did not then assent* to the correctness *of the several charges and estimates* in the said statement, *although he expressed his willingness to sell his undivided moiety of the said wharf and premises for the price proposed by the complainant, if this defendant should be satisfied, on examination, that he would actually receive a compensation fully equal in value to the said price;* and *therefore* the said statement was delivered to this defendant, *for the purpose of examination and consideration as aforesaid*, and *has always since been, and now is, in the possession of this defendant;* and in reference to the said verbal agreement, and explanatory of the condition on which this defendant was willing to carry the same into effect, this defendant a few *days after* he received the said statement, having discovered a *part of the representations made to him*, as aforesaid, to be incorrect, wrote a letter to the complainant, representing *the said conditions* so far as they were affected by the discovery then made, a copy of which letter this defendant herewith exhibits, which he prays may be received as a part of this his answer; which letter was, as this defendant believes, delivered to the complainant, and was read by him, and is probably in his possession, or in his power to produce; and this defendant prays that the said original letter may be here produced. The answer also states,

that upon subsequent examination, the account which was made out, and in which was the entry of "E. B. wharf, &c." had been found erroneous in many particulars.

The answer submits to the decision of the Court, whether the account set forth in the complainant's bill, is "an agreement, such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed and prayed by the complainant."

The letter referred to, in the defendant's answer, is as follows:—

Baltimore, 7th October 1820.

MR. GRIFFITH COOMBE,

Sir:—Having agreed to sell you my undivided half interest in the Eastern Branch wharf and premises, at Washington, lately deeded to you and to me, by James D. Barry, I hereby bind myself to give you a good and sufficient conveyance of all my right and title in law and equity for the same, as soon as you send me, or that I receive, the stock of leather now working out at the tanyard, (the same being a part of the consideration for my right to said property,) or otherwise place the proceeds thereof at my disposal, as far as you have, or can, or shall have, the right or power to do, or cause to be done, agreeably to the inventory lately given me by Mr. Edmund Rice, of said stock and materials, which inventory must embrace a quantity of finished leather, amounting to about eight hundred and six dollars, removed by him to his brother William's store; and as this lien to you is blended with a lien to others, I further engage on receipt of said stock of leather, to provide likewise for the lien held thereon by Mr. Daniel Carroll, of Dud. for about eighteen hundred dollars, and also for the payment of a lien on said stock of leather, to secure the amount of a note due to Edmund Rice, or endorsed by him, at the Patriotic Bank, for about twelve hundred dollars; and, in other respects, to settle for any balance I may owe you on the account you have furnished me, agreeable to the principles of equity and justice.

I remain, &c. yours, respectfully.

P. S. The effect of the paper signed by you, and deposited with Mr. Carroll, will, of course, remain suspended, subject to its conditions, for the purpose of carrying the foregoing into effect, and which will, by me, be complied with in good faith.

The evidence before the Circuit Court, consisting of the examinations of Mr. Pleasanton, Mr. Carroll, and others, and

what is contained in the record, are sufficiently stated in the opinion of the Court.

The case was argued for the appellant by Mr. Cox, and Mr. Worthington; and by Mr. Jones, for the appellee.

The appellant contended:

1st. That there was no final agreement between the parties.

2d. If there was, it was void under the statute of frauds.

3d. Supposing an agreement fully concluded, it was obtained by misrepresentation, and fraudulent concealment.

4th. It was without consideration.

The counsel for the appellant cited the following authorities:—13 *Vez.* 76. *Prec. in Chan.* 560. 1 *Atk.* 12. 449. *Ib.* 497. 2 *Dessas*, 145. 1 *John. Ch. Rep.* 149. 279. 283. 1 *Cox*, 222. 1 *P. Williams*, 771, *n. Sugden on Vend.* 71. 86. 91. 1 *Equ. Cases Abr.* 20. 4 *Taunt.* 754. *Jones on Cont.* 167. 1 *Sch. & Lef.* 22. 1 *Vez. jr.* 226. 336. 2 *Sch. & Lef.* 7. 557. 3 *Vez.* 185. 379. 6 *Vez.* 89. 1 *Edw.* 516. 8 *Com. Dig.* 362. *Sh.* 705. *L. Ray.* 1410. 2 *Camp.* 308. 2 *Atk.* 488. 3 *Camp.* 493. 15 *East*, 7. 3 *T. Rep.* 757. 761. 2 *P. Williams*, 217. 3 *Atk.* 283, 6. 1 *Dessas*, 257. 2 *Sch. & Lef.* 554. 18 *Vez.* 10. 2 *Bell & Beat.* 369. 1 *Ib.* 256. 2 *Wheat.* 336. 7 *Vez.* 341. 5 *Serg. & Lowb.* 485. 2 *Caines' R.* 241. 4 *John.* 251. 2 *Ib.* 300. 16 *Ib.* 54.

For the appellee, it was argued,

1. That the original agreement was sufficiently certain and precise in its terms; and was ascertained by a sufficient *memorandum* in writing, under the statute of *frauds*.

2. That, if the original *memorandum* in writing were, at all, defective, the case is taken out of the statute by the *answer*, which fully admits the agreement charged in the bill, without pleading, or, in any manner, relying on the statute.

3. That the collateral matters of pretended equity, set up in the answer by way of *avoidance*, are, for the most part, utterly foreign to the merits of a *specific execution* of the agreement; and, in so far as they are at all material to any question between the parties to this cause, required substantive proof to support the answer: of not one of which has the *appellant* offered or pretended any manner of proof; but has turned his back on the most obvious means and ample opportunities, challenging him to the proof from accessible and unfailing sources of evidence, if there had been any truth in his averments; which, moreover, have been positively contradicted, in every material circumstance, and conclusively disproved by the evidence in the cause.

4. That the *appellee* is entitled to a specific execution of the agreement, upon principles wholly independent of all the solemnities required by the statute, in consequence of an equitable obligation, affecting the *conscience* of the *appellant*, beyond

the mere force of an express *contract*, and combining, in this case, all the equitable circumstances; any one of which was sufficient to bring a specific execution of the contract within the appropriate jurisdiction of equity to relieve against *fraud*. 1st. Because the appellant practised *finesse* to evade the instantaneous execution of the agreement, by promising that he would, in a few days, reduce it to the more solemn and consummate form of a regular conveyance for the land, and of promissory notes for the balance of account remaining due, after taking credit for the purchase money of the land; and, in the mean time, drew from the appellee, upon the faith of that promise, all the valuable equivalents of the agreement. 2dly. Because the contract has been completely executed, on the part of the purchaser, by *payment* of all the *purchase money*, and, in part, executed on both sides, by an exclusive, long continued, and unquestioned *possession* in the purchaser, under the contract. 3dly. Because the purchaser has made large expenditures, in extensive, and beneficial improvements of the property, upon the faith of the contract.

Mr. Justice Johnson, delivered the opinion of the Court.—

This appeal brings up for revision a decree of the Circuit Court of this district, by which this appellant has been required to execute, specifically, an agreement for the sale of land. The bill sets up a certain written instrument, as a sufficient memorandum in writing; but not relying solely on that, goes on to make out one of those cases, in which a Court of Equity exercises this branch of its jurisdiction, in order that the statute of frauds may not be made a cloak for fraud; that is a case of performance on the part of the complainant.

This has caused the question on the right to relief, in a case within the provisions of the statute, to be mixed up with a great deal of extraneous matter, which need not have been set out, had the claim to relief been confined to the one ground alone.

The memorandum set up is in the form of a stated account, wholly in the handwriting of the appellant, Barry, the defendant below, and acknowledged to be a copy made by him of another, also made out in his handwriting, actually signed by Coombe the appellee, and now in the hands of Barry. So that Barry's name is in the caption, if it may be so called, and Coombe's at the foot of the memorandum. The item of the account, which relates to the bargain or agreement for the sale of the land, is in these words, letters, and figures.

"By my purchase of your ½ E. B. wharf and premises this day as agreed on between us;" and the credit is carried out in figures $7578 63, and deducted from the amount charged to Barry.

Then follows this memorandum, "balance due G. Coombe fifteen hundred Dollars, payable in one two and three years with interest. G. COOMBE."

The defence set up in the answer is, that the transaction was not final; that it amounted to nothing more than a treaty in progress; that as far as it proceeded it was obtained by false and fraudulent suggestions on the part of complainant; and that the name of defendant was signed, if signed at all, only to state an account, not to acknowledge a contract; and the answer concludes with submitting to the Court, whether it be "an agreement such as is required by law and equity, to compel the defendant to make the sale and conveyance claimed, and prayed for by complainant."

It is under these words alone, that the protection of the statute of frauds is set up by defendant. But in the view which this Court will take of this subject, it is unnecessary to inquire, whether the case required or admitted that it should be more formally pleaded, since we will dispose of the cause under the admission, that he has entitled himself by his answer to the full benefit of the statute, if the facts of the case would maintain the defence.

And first it is obvious, that it would be idle to consider the form and effect of the instrument, if the treaty was never brought to a conclusion. On this fact the answer has put the complainant upon proof, and two witnesses have been examined to the point. Mr. Pleasanton the first witness swears—that in the year 1820, the defendant showed him a statement of accounts, which he believes was a copy of one exhibited by the complainant, and informed him that he had made a settlement of accounts with complainant, that the account so shown exhibited a balance against the defendant of 500 or 1500 dollars, that it was in Barry's own handwriting, and that he stated, as an inducement to make it, that Coombe had made a sacrifice to obtain it.

The account so shown to Mr. Pleasanton, could have been no other than the original of that which Coombe has exhibited, and the facts to which this witness testifies, are strongly indicative of a final transaction.

The next witness, Mr. Carroll, is still more positive. He was present at the transaction, and, as he testifies, at the request of both parties, became the depository of several documents relating to it; and on the subject of the conclusive character of the transaction, his language is "that he understood the settlement to be final and absolute."

But there were other facts to which Mr. Carroll was examined; and it is argued, that his testimony as to those facts goes to prove, that he was mistaken in the view which he took

of the transactions; that they go to prove that there was something yet to be done, before the agreement should be closed. Coombe, it seems, insisted that Barry should give his note for the balance stated, and a deed for the property before he left Washington. This Barry resisted, and finally left Washington without doing either, and returned to his home at Baltimore.

It cannot be denied that this does conduce to prove an unfinished treaty, but the inference is repelled by various considerations.

And first, preparing the deed might require time, his business may have pressed for his return home, or he may have wished his own counsel or scrivener to draw up the deed.

2. As to the notes, giving them, made no part of the agreement reduced to writing; the balance stated was to have been paid in one, two, and three years, but it does not express that notes are to be given for it, and he may have had his reasons for declining to give his notes, or for taking advice upon it. If there should prove to be errors in the stated accounts, upon more deliberate examination, these errors might more conveniently have been adjusted upon the stated balance, than upon notes, which might have found their way into several hands, and thus have multiplied litigation.

3. It does not appear from Mr. Carroll's testimony, that Barry refused generally to give either deed or notes, but only to give them before he went to Baltimore; on the contrary, he appears to have resented Coombe's seeming to act upon a doubt that he would then execute and send them, and to this Mr. Carroll bears positive testimony, when he says "that he understood that the notes and deed were as certainly to be sent on from Baltimore, as if executed on that day."

But what is conclusive in this part of the cause is, that the transaction was followed up by an act on the part of Barry, which no honest man could have done, otherwise than in the supposition that it was a finished transaction. It appears that Coombe, together with Mr. Carroll and Mr. Rice, held a mortgage of a quantity of leather to the value of 7000 dollars, given to secure to them certain sums advanced on behalf of one James D. Barry; that the defendant Robert Barry had assumed the debts of James D. Barry, and thereby acquired a resulting use, or equity of redemption, in this leather. That the sum for which Coombe held his lien on the leather, to wit, 4209 dollars, was one of the items of account in the exhibit upon which the complainant relies, to obtain a decree for specific performance. But, as a balance of 1500 dollars still remained due to Coombe upon the stated account, the leather was still pledged to him for that amount. This interest Coombe was induced to release to Barry, and which he accordingly did, by an endorsement upon the

instrument of writing by which the lien was created. And *Mr.* Carroll testifies "that the defendant did receive at the tanyard in Washington, all the leather mentioned in the bill of sale, *in consequence of complainant's release.*"

It is true, an attempt was afterwards made in this suit to arrest the leather in the hands of Barry, but it was not on the ground that the treaty was *in fieri*, or the release not final; but to subject the leather to the debt, which would be due to the complainant, if he could not obtain the specific execution of the sale of the wharf, as well as the acknowledged balance. It is obvious then, that in reducing the leather into possession, Mr. Barry must either have acted fairly, on the idea of a finished transaction, or unfairly, by entering upon the fruition a fraud practised to obtain the release.

We will consider him as having acted fairly upon the ground of a treaty final and concluded, to be carried into execution according to its terms. But the statute of Frauds in Maryland requires written evidence of the contract, or a Court cannot decree performance. Is this such written evidence of a "contract or sale of lands" as satisfies the exigency of that statute? The words of the statute are, "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party, to be charged therewith, or by some other person, by him thereunto lawfully authorized."

A note or memorandum in writing of the agreement, therefore, is sufficient, and there is no question that in order to obtain a specific performance in equity, the note in writing must be sufficient to maintain an action at law. The form is not regarded, nor the place of signature, provided it be in the handwriting of the party or his agent, and furnish evidence of a complete and practicable agreement. A Court of Equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c.

At first view, this would seem to be an anomalous case, but it is only necessary to reduce it to its elements, in order to discover, that it is one known to the adjudications of Courts of Equity on this statute. As to the balance stated, it is final and conclusive between these parties, and *insimul computassent*, might be maintained upon it, by Coombe, for the amount. And in an action by him, going to claim the whole amount charged to Barry, it would be good evidence in the hands of Barry, to reduce Coombe's demand down to the balance stated.

It is then equivalent to a mutual and reciprocal receipt between these parties; on the one hand, Coombe signs a receipt for the price of the premises in controversy, in account with

Barry, and Barry on the other, signs a receipt to Coombe, acknowledging that he has received the price stipulated, in full of the purchase money of the same.

This is the real purport and effect of the writing in evidence, and had the instrument, signed by the parties, been expressed in these terms, there could not have been a doubt of its sufficiency, (12 *Vez. jr.* 466. 9 *Vez. jr.* 234.) But it is argued that this was not the intent with which the writing was concocted. That it was to state an account, and not to note an agreement for the sale of property, that it was drawn up and signed. An examination of the cases on this subject, will show that Courts of Equity are not particular with regard to the direct and immediate purpose for which the written evidence of a contract was created. *It is written evidence*, which the statute requires, and a note or letter, and even in one case, a letter, the object of which was to annul the contract, on a ground really not unreasonable, (1 *Atk.* 12. 1 *Sch. & Lef.* 22,) has been held to bring a case within the provisions of the statute. But, in the present instance, although not the sole object of creating the instrument, it really was an object, and an important one, inasmuch as the balance of account, the immediate object of the stated account, mainly depended upon the item for the sale of these premises. It could not be stated without acknowledging, that the one had agreed to sell and the other to purchase these premises, at a stated price. On this part of the cause, the case of Stokes *vs.* Moore, has been cited, (1 *Cox*, 218,) and insisted on as furnishing an argument, against the sufficiency of the signature of Barry in this cause. But in the case of Stokes *vs.* Moore, it must be observed, that both the Judges who sat on that cause admit that this was not the principal question in the cause, and it was decided upon the ground, that the memorandum was proved but to express the entire agreement between the parties. But, if considered as authority in this point, it is only necessary to advert to the ground upon which the opinion is expressed, "that the name there was not a sufficient signature under the statute," in order to discover that it does not impugn the opinion entertained by this Court in the present cause. The rule there laid down is, "that the signature is to have the effect of giving authenticity to the whole instrument;" and in this instance, we hold it to be in its proper place, for that purpose. If so, the Court there further observes, "that it does not signify much in what part of the instrument it is to be found." It remains to examine whether the memorandum is sufficiently full and explicit, to admit of a decree for specific performance. The words are, "By my purchase of your ½ E. B. wharf and premises, this day, as agreed on between us, $7578 63." Brief as it is, this memorandum contains a condensed summary of all the es-

sentials to a complete contract. By the use of the present tense, it speaks of a thing final and concluded. By reference to the date at the head of the account, the use of the words "this day" gives a date to the transaction. By the use of the pronouns *your* and *us*, the parties are distinctly introduced. By carrying out the price, the consideration is expressed with absolute precision, and by deducting it from the sum acknowledged due by Barry, the receipt of the consideration is acknowledged; nor is there a single ingredient of a complete contract deficient, unless the description of the property contracted for, be insufficient. If that description be fatally ambiguous, it is certainly a sufficient ground to refuse relief. The ambiguity here, arises from the use of the capital letters E. B. in the description of the premises; and if those letters stood alone, and unconnected with any thing that could give them a definitive signification, there would be much reason to doubt whether the defect would be curable. The words are, "Your ½ E. B. wharf and premises," and it is argued that this is one of those ambiguities, generally designated by the epithet—patent, and as such, admitting of no explanation from extrinsic evidence.

Sir Francis Bacon, in his elements of common law, (*Regula* 23,) is the author usually referred to on this distribution of ambiguities, into *patent* and *latent;* the former appearing on the face of the instrument, and not to be removed by extrinsic evidence, but only, in the language of the author, "to be holpen by construction or election;" the latter raised by reference to extrinsic circumstances, and remediable by the same means. It would perhaps be a more convenient, and certainly a more intelligible distribution of the doctrine on this subject, if the cases were divided into positive, relative, and mixed; the positive corresponding to the patent; and the relative to the latent ambiguities of the authors who treat of the subject. The mixed, would consist of those cases in which, although the ambiguity is suggested on the face of the instrument, the face of the instrument also suggests the medium by which the ambiguity may be removed.

The facts of this case will bring it either within the second or third class; within the second, because, for any thing that appears on the face of the instrument, E. B. wharf, may be as definitive a description of locality as F street, and then the ambiguity could only arise, if it be shown that the bargainor had more than one house in F street, like the two manors of Sale, put by several authors.

Perhaps this case belongs more properly to the third class, since the description suggests several circumstances of identity, by reference to which, the premises in question are distinguishable from all others; first, it is a wharf; secondly, a wharf

the property of Barry; thirdly, a wharf of which he owns a moiety; and connected with these descriptive circumstances, the letters E. B. became in fact the initials of the name of a place; and the case is analogous to that of a will, in which the devisee is designated as my son A, my nephew B. C, or my uncle D. E, in which the circumstance of relationship, will let in evidence to fill up the names designated by the initials.

In fact the cases on this point have gone much farther, and without committing ourselves on the correctness of the following two, it will be found by referring to them, such evidence has been let in to supply names, in cases where the identification was by no means as circumstantial as the present.

In the case of Price *vs.* Page, (4 *Vez. jun.* 68,) the entire Christian name was supplied on parol evidence without any initial, Price the son of Price being the only designation. In the case of Abbot *vs.* Massie, (3 *Vez. jun.*) the devise was to A. G. and Mrs. G. and evidence ordered to be received to identify the legatees.

If ever extrinsic evidence may be admitted to carry out the initials of a name, it is impossible that a case can occur, to furnish evidence more full or unexceptionable in its character, than the present. The bill alleges that the letters E. B. mean Eastern Branch, and the defendant not only admits in his answer, that the treaty had relation to his moiety of a wharf and premises on the Eastern Branch of the Potomac, but voluntarily, although *altero intentii*, introduces a letter from himself to complainant, in which it is explicitly acknowledged. "Having agreed to sell you my individual half-interest in the Eastern Branch wharf and premises," is his language in the letter. Besides which, the original deed is spread upon the record, by which it appears that the defendant held a moiety, as tenant in common with the plaintiff, of a wharf and premises on the Eastern Branch of the Potomac river, which is well known in common parlance as the Eastern Branch, without the addition of Potomac or river. We are therefore of opinion, that the ambiguity is fully removed, and legally, since it is by reference to a medium of explanation suggested on the face of the memorandum; and on evidence, which while it neither adds to, detracts from, nor varies the note in writing, supplies every exigency of the statute of frauds.

The only remaining question arises on the effects of Coombe's letter of the 26th of March 1822, which the defendant insists amounted to a relinquishment of the contract of sale, and this appears to some of the Court, to present the greatest difficulty in the cause. For it cannot be denied, that the letter is not confined in its import to a demand of a fulfilment of the contract. It does not intimate an intention to enforce the contract;

but on the contrary, concludes with a declaration, that if Barry does not comply with this contract on his part, the complainant will hold himself exonerated, and will resort to his original money contract, as it stood prior to their entering into the contract for the sale of the premises.

Nothing therefore, but the equivocal conduct of Barry on the receipt of that letter as proved in the deposition of Ingle, deprives him of the benefit of this defence. To have availed himself of it, he should have adopted the alternative offered him; and as the only unequivocal proof of it, should have tendered to Coombe the amount justly due to him, after extracting that item from the account. This he did not do, and it was too late after the bill filed to claim the benefit of a right thus gone by; at least, without paying unto Coombe the amount which would have been due to Coombe upon a mutual relinquishment of the bargain.

As to the ground of misrepresentation and fraudulent concealment, we have not thought it necessary to say more, than that there is not the least evidence to support the charge set up in the answer.

Nor is it necessary to examine the case on the ground of part performance, since this Court is fully satisfied on the sufficiency of the memorandum in writing to sustain the decree; so far as it requires Barry to make title to the moiety of the wharf, lot and premises.

With regard to that part of the decree which relates to the payment of the balance of the stated account, and perpetuates the injunction not to remove certain property beyond the jurisdiction of the Court, until that balance be paid, we are induced to consider all objections to be waived.

Yet we mean not to express any doubts of its correctness, since the defendant has no where put his defence upon the ground of the remedy at law; but on the contrary, by his answer he impeaches the conclusiveness of the stated account, and raises an issue, in equity, upon the fairness and correctness of several items, which if expunged would leave a balance in his favour.

This defence he has failed to sustain by proof, and the Court on that ground alone, independent of its connexion with the principal subject of the bill, might legally decree payment of the stated balance, and the means of enforcing payment.

Decree affirmed with costs, and cause remitted for final proceedings.

ALLISON ROSS, PLAINTIFF IN ERROR, *vs.* JOHN DOE ON THE DEMISE OF ADAM BARLAND, AND OTHERS.

Both the plaintiff and defendants claimed title under the provisions of the Act of Congress, passed 3d March, 1803, entitled "An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee;" and the decision of the Supreme Court of the state of Mississippi, was, upon the construction given to that Act, by the commissioners acting under its authority. This is a case which draws into question the construction of an Act of Congress, and the Supreme Court of the United States has jurisdiction on a writ of error, by which the decision of the Court of the state of Mississippi is brought up for revision, under the 25th section of the Judiciary Act of 1789. {663}

Where by the established practice of Courts in particular states, the Courts in actions of ejectment look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation; such a practice will form the law of cases decided under the same in these states, and the Supreme Court of the United States, regard those rules of decision in cases brought up from such states, provided that in so doing, they do not suffer the provisions of any statute of the United States to be violated. {664}

Under the Act of Congress of March 3d, 1803, such lands only were authorized to be offered for sale, as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof. A right therefore, to a particular tract of land derived from a donation certificate given under that law, is superior to the title of any one who purchased the same land at the public sales, unless there is some fatal infirmity in the certificate, which renders it void. {666}

The Act of Congress requires no precise form for the donation certificate. It is sufficient if the proofs be exhibited to the Court of commissioners, to satisfy them of the facts entitling the party to the certificate. It is sufficient if the consideration, to wit the occupancy, and the quantity granted, appears. Nothing more is necessary to certify to the government the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent. {666}

The second section of the Act of Congress of March 3, 1803, was intended to confer a bounty on a numerous class of individuals, and in construing the ambiguous words of the section, it is the duty of the Court to adopt that construction which will best effect the liberal intentions of the legislature. {667}

The time when the territory over which this law operated was evacuated by the Spanish troops, was very important; as the law was intended to provide for those who were actually at that time inhabitants of, and cultivated the soil within it; but whether it was in 1797, or 1798, was comparatively unimportant. The decision of the commissioners upon the period when the evacuation took place, is sufficient; and the Court are disposed to adopt the construction of the Act, given by the commissioners west of Pearl river: that the evacuation took place on the 30th March, 1798, by which persons coming within the objects of the section, were entitled to donation certificates. {667}

(Ross vs. Doe on the demise of Barland et al.)

Congress have treated as erroneous, the construction given to the law by the commissioners to settle claims to lands east of Pearl rivet, who have decided, that only those who were settled on the lands within the territory in the year 1797, were entitled to donation certificates, and who had granted to others preemption certificates. {668}

The commissioners appointed under the Act of Congress relative to claims to lands of the United States south of the state of Tennessee, were authorized to hear evidence as to the time of the actual evacuation of the territory by the Spanish troops; and to decide upon the fact. The law gave them power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and equity; and declared their deliberations shall be final. The Court are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that consequently, it was shown to them, that the final evacuation of the territory by the Spanish troops, took place on the 30th of March, 1798. {668}

ERROR to the Supreme Court of the state of Mississippi.

This action of ejectment was originally instituted by the lessee of the defendants in error, in the Circuit Court of the state of Mississippi, citizens of that state, against Allison Ross, the plaintiff in error, to recover a tract of land lying in that state. The plaintiff, in that Court, obtained a verdict for the land, and on the trial of the cause a bill of exceptions was taken to the opinion of the Circuit Court, upon certain instructions which were refused to be given, when required by the counsel for the defendant below. From the decision of the state Circuit Court, the defendant in that Court, appealed to the Supreme Court of the state of Mississippi, and the judgment of the Circuit Court having been affirmed in that Court, he prosecuted a writ of error to this Court.

The bill of exceptions, sent up with the record, sets forth that the counsel for the plaintiff in error, moved the Circuit Court to instruct the jury, that, if they should be of opinion, that the defendant in the ejectment was in possession of the land in controversy, under a patent from the United States to Isaac Ross, dated 12th August 1819, and assigned by him to the said defendant, the plaintiff in the ejectment could not recover. The patent to Isaac Ross, was founded upon a certificate of the Register of the land-office west of Pearl river, and was for the land in controversy; which had been sold at the sales of the lands of the United States, and purchased by Isaac Ross, who afterwards assigned the same to Allison Ross, the defendant below.

The patent was of older date than the patent held by the lessors of the plaintiff below; which patent was issued to Joseph White, on a certificate of the Board of Commissioners, west of Pearl river, granted in pursuance of an Act of Congress, passed the 3d of March 1803, entitled "An Act regulating

the grants of land, and providing for the sales of lands of the United States, south of the state of Tennessee."

The instructions required, claimed that the elder patent of the defendant below, should prevail in the action of ejectment, in a Court of Law, against the junior patent of the plaintiff, although the junior patent emanated from a prior certificate of the commissioners.

The Court refused to give the instructions prayed for, but on the contrary instructed them that the junior patent of the plaintiff in the ejectment, emanating upon a certificate for a donation claim, prior in date to the patent under which the defendant claims, would overreach the elder patent of the defendant, and in point of law should prevail against it.

The plaintiff in error contended, that the Court below erred in refusing the instructions prayed for, and in the instructions they gave to the jury in favour of the title of the plaintiff in the ejectment.

The case was argued for the plaintiff in error, by Mr. Wirt, Attorney General, and by Mr. Coxe for the defendants.

For the plaintiff in error.—The patent under which the defendants claim to hold the land, was granted under a donation certificate, issued by the Board of Commissioners, west of Pearl river. The land in question was sold at public sale, by the government of the United States, and was purchased by the assignor of the plaintiff in error, ignorant of any other title—the purchase money was paid—a patent issued to him, from the general land-office, and possession was taken. The holder of the donation certificate applied for a patent, and the land-office, not knowing of the prior patent, granted his request, and he holding a junior patent, brought this ejectment in the state Court of Mississippi. The question before that Court was; whether before a Court of Law, the junior patent could be given in evidence. The Court refused to instruct the jury that the senior patent was the best title, and gave instructions that the junior patent, in conformity with the donation certificate, gave the defendant in error the title to the land described in it.

The first question to be considered is: Whether in a Court of Law, the proceedings, behind the patent, can be looked at to ascertain the validity of such a patent?

Several references have been given by the opposite counsel, but they are all cases of Chancery proceedings, and there is no doubt Chancery can do this. The question now is, can a *Court of Law* do it? It has been decided here, that this can be done; but this was only when the local law of the state, in which the case arose, authorized such an examination; but not

upon any principles of general law. Polk's Lessee *vs.* Wendell et al. 9 *Cranch*, 87. 1 *Wheat.* 432. 5 *Wheat.* 293.

The decisions of the Courts of Virginia consider the prior patent conclusive, unless in case of fraud; and it is not known that any adjudications in the Courts of Mississippi have established a different principle.

2. But if the Court can go into the examination of circumstances which preceded the patent, still the instruction given to the jury was wrong, as the junior patent cannot prevail, unless it is warranted by the prior steps.

The certificate given by the commissioners is not a donation, but a pre-emption certificate. This is shown by a reference to the provisions of the Act of Congress. The Act of 3d March 1803, (2 *Story's Laws U. S.* 893,) is the foundation of the certificate.

The second section of that Act gives land to those who "actually inhabited and cultivated" the tract, on the day the Spanish troops actually evacuated the territory, on the 27th October 1797.

The third section gives to persons inhabiting and *cultivating* a tract at the time of the passing of the law, a pre-emption certificate for such tract. The certificate under which the plaintiffs below applied for a patent, states the occupation of the tract by the patentee, on the 13th of March 1798. This, therefore, could not be a donation certificate, which could only be granted to a person who "inhabited and cultivated" the land on the 27th of October 1797, and it must have been given under the third section, which authorizes the issuing of pre-emption certificates.

The certificate granted to the holder of the junior patent, states, that he "occupied" the land, and this does not, *ex vi termini*, mean inhabit and cultivate.

It was the duty of the plaintiff to make out a good title, and if he does not show, that by the course of decisions in Mississippi you can look behind the patent, he has failed to do so.

The period at which the territory was actually evacuated by the Spanish troops, is not known to the Court, otherwise than as stated in the Act of Congress; which affirms the same to have been on the 27th of October 1797. Congress have legislated as to the lands east of Pearl river, but there has been no legislation as to those which lie west of the same. The Court have here nothing to do, but to decide whether this certificate is a donation certificate, within the second section of the law; and to do this, they must decide upon facts which were for the jury alone.

Coxe for the defendant in error.—

1. This is not a case in which the Supreme Court can entertain jurisdiction. It is a writ of error directed to the highest

Court of the state of Mississippi; and the 25th section of the Judiciary Act, furnishes the only rule by which to determine the question of jurisdiction.

The plaintiff in error has not produced the clause in the Constitution—the treaty or statute, under which he claims this proceeding; nor can he designate it. The Court below being of opinion, that the case of the defendant in error was within the provisions of the Act of Congress, decided the case upon general principles, and held that his title is, in law and equity, paramount to that of his opponent. Had the Court decided differently, this Court would have had jurisdiction; but the Constitution and Judiciary Act do not confer this jurisdiction in every case, in which the plaintiff in error claims title under a patent from the United States; which is the only ground upon which it is pretended to exist here. Should this doctrine meet the sanction of the Court, it will be difficult to conceive a case of ejectment that can be brought in any of our states, in which this Court may not entertain jurisdiction; for nearly every title is derived from, or depends upon a patent from the United States.

Again, what question can this Court decide, admitting it to possess jurisdiction? The same 25th section expressly declares, that no error shall be assigned, or regarded as a ground of reversal, but such as appears on the face of the record, and immediately respects the before mentioned questions of validity or construction of the said Constitution, &c. No such question is presented on this record. The construction of the 25th section has been frequently before this Court, and may be considered as settled. Inglee *vs.* Coolidge, 2 *Wheat.* 368, decides, that the error contemplated in the statute, must be apparent on the record. Matthews *vs.* Zane, 7 *Wheat.* 164. Martin *vs.* Hunter, 1 *Wheat.* 357. Montgomery *vs.* Hernandez, 12 *Wheat.* 132. Hickie et al. *vs.* Starke et al., at this Term, *ante*, *p.* 94.

The case is clear upon the merits, should the Court examine them. The title of defendant in error is based upon the 2d section of the Act of March 3d, 1803, c. 340. 3 L. U. S. 546. To every person, &c., who did on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, &c., the said tract of land, thus inhabited and cultivated, shall be granted. The objection is, that the certificate of the Board of Commissioners under which this title is derived, shows an occupancy on and before the 30th of March 1798. It is admitted, that this is, *prima facie*, erroneous, and that it is incumbent on the party claiming under such a donation certificate, to show that it is warranted by the fair construction of the statute.

The design of Congress in this section, was to secure the

titles of actual occupants, who had taken possession under Spanish authorities; and the period up to which such occupancy should be entitled to this protection, is fixed by two circumstances—it must be on a day in the year 1797—and on the day when the Spanish troops finally evacuated this territory, the right to which had been so long contested between the two nations, and which was finally settled by the treaty of 1795.

It is certainly true, that Congress at the date of this law, were ignorant of the precise day when this evacuation occurred, and were mistaken as to the year. The Spanish troops finally evacuated the territory, on the 30th of March 1798, as is stated by an eye-witness of the fact; *Ellicott's Journ.* 176. Under the Act of 1803, two Boards of Commissioners were created, the one for the lands east of Pearl river, the other for the lands west of the same stream. These Boards were organized, and proceeded to business in the latter part of the same year. The Board to the west of Pearl river, discovered the incongruity in the statute. This Board proceeded to execute their duties, and all their donation certificates, amounting in number to near 300, have reference to an occupancy on and before the 30th March 1798. This construction of the law, it is apprehended, is not only correct in itself, but has received the implied sanction of the legislature. In consequence of the diversity of opinion and of practice between the two Boards, Congress passed another law, on the 21st of April 1806, c. 46; the 4th section of which enacts, that whenever it shall appear, to the satisfaction of the register and receiver of the district east of Pearl river, that the settlement and occupancy, by virtue of which a pre-emption certificate had been granted by the commissioners, had been made and taken place prior to the 30th of March 1798, they shall be authorized to grant to the party a donation certificate in lieu of such pre-emption. This was a legislative sanction, given to the opinion of the Board of Commissioners, west of Pearl river, who had, in the cases contemplated in this provision, considered the parties as within the 2d section of the Act of 1803, and therefore entitled to a donation certificate; and a legislative repudiation of the construction given by the other Board, who had considered such cases as coming within the 3d section of the Act of 1803, and the parties entitled only to a pre-emption title. On the 31st of March 1808, Congress passed another law, c. 40, the 2d section of which re-enacts and extends the benefit of the 4th section of the Act of April 21st 1806.

Independently, however, of these legislative provisions, it is the only fair interpretation of which, under the circumstances, the 2d section of the Act of 1803 is susceptible. A literal compliance with the Act is impossible, as there was no day in

the year 1797, in which the Spanish troops finally evacuated the Mississippi territory. Either some latitude of construction must be admitted, or this section must become a dead letter, and every title dependent upon its provisions, annulled. The obvious meaning of the Act, was to make the period of evacuation the *punctum temporis*, to which the occupancy should refer, and as the one incident or the other, must yield, in order to carry the whole design of the legislature into operation, the expunging of the words "in the year 1797," involves the least sacrifice, and tends more effectually than any thing else, to further the intentions of the legislature.

In settling this question of construction, the practice of the government, and of its lawfully authorized agents is entitled to much consideration. This construction has received the sanction of the Board of Commissioners, who were invested not only with ministerial, but judicial functions; and who throughout the whole period of their existence so interpreted the law. It has received the sanction of the land-office, and of the executive, for patents have invariably been granted on such certificates.

In Edward's lessee *vs.* Darby, 12 *Wheat.* 210, this Court seems to recognise the importance of recurring to such sources of information.

In order to arrive at the true construction of a statute, or even to enable it correctly to interpret the provisions of the Constitution, the Court will refer to, and judicially notice the historical facts which are essential to their correct interpretation. This was done in the case of Gibbons *vs.* Ogden, 9 *Wheat.* 1.

If then, this form of certificate be correct under the law, what is its operation? The 2d section says that the land thus occupied shall be granted to the occupant; this does look as if Congress designed some ulterior act to be done to vest the title. The language of the 8th section amounts, however, to a present legislative grant. It provides, that so much of the five millions of acres, reserved for that purpose, as may be necessary to satisfy various classes of claims, enumerating particularly those which are embraced by the 2d section of the Act, "be and the same is hereby appropriated." This language is more definite than that which this Court, in Simms *vs.* Irvine, 3 *Dall.* 425, construed to confer a legal title as effectually as a patent. Cited also 2 *Wheat.* 196.

If this view of the case be correct, it follows, that the title of the plaintiff in error is radically and intrinsically a nullity. The patent under which he claims, cannot be valid even at law, if at the period of its emanation, the United States had no title. Polk's Lessee *vs.* Wendell, 9 *Cranch*, 87. 94. Patterson *vs.* Winn, 11 *Wheat.* 304.

(Ross vs. Doe on the demise of Barland et al.)

Neither the language, nor the policy of any law, limits the time within which we were to call for the patent. No money was to be paid beyond the mere official fee for the paper. No person could be injured by the delay; and in this view, nearly all the patents emanating on donation certificates, bear date about the same period of time.

The case is therefore relieved from the difficulties presented by the question whether the Court will look behind the elder patent, and investigate the prior rights of the parties. The various decisions on that question relate exclusively to cases in which no other than an equitable title existed before the patent, and where the patent itself properly issued. Even in such cases, this Court has adopted the practice of the state Courts where the land was situated, and have decided either for or against the conclusiveness of the patent, as to the legal title, according to the varying ideas of the state Courts. In this case it is incumbent on the plaintiff in error to show, affirmatively, that the state Court has erred. Kirk *vs.* Smith, 9 *Wheat.* 241. And to do this, he must show, that under the law of Mississippi, the patent is the only and conclusive evidence of the legal title. No authority to this point, can, it is believed, be produced.

Mr. Justice TRIMBLE delivered the opinion of the Court.—

This was an action of ejectment, originally instituted in a Circuit Court of the state of Missisippi.

Upon the trial of the cause, in the Court of original jurisdiction, the defendant excepted to the opinion of the Court, in overruling instructions moved on his part, to be given to the jury, and also to the instructions given by the Court, at the trial of the cause.

In the bill of exceptions tendered by the plaintiff in error in the Court below, are inserted the titles of the parties to the land in controversy, and the facts, upon which the questions of law arise, which were decided by the Court. A verdict and judgment were rendered against the defendant, from which he appealed to the Supreme Court of the state, being the highest Court of law therein, where the judgment was affirmed; and the case is now brought before this Court, by writ of error to the Supreme Court of the state.

The material facts of the case are the following: The lessors of the plaintiffs in the action of ejectment, claimed the land in controversy under and by virtue of a patent from the United States, dated the 13th day of October 1820, which was given in evidence. This patent emanated upon a certificate of the Board of Commissioners west of Pearl river, organized under the provisions of the Act of Congress, of the 3d of March 1803, entitled "An Act regulating the grants of land, and providing

for the disposal of the lands of the United States, south of the state of Tennessee;" which certificate was also given in evidence, and bears date the 13th day of February 1807. The important parts of the certificate are in the following words, to wit: Joseph White claims a tract of six hundred and forty acres of land, situated in Claiborne county, on the waters of Bayou Pierre, by virtue of the occupancy of the claimant on and before the 30th day of March, in the year one thousand seven hundred and ninety-eight. We certify that the said Joseph White is entitled to a patent therefor, from the United States, by virtue of the recited Act."

The defendant claimed and held possession of the land, under and by virtue of a patent from the United States, dated the 12th day of August 1819, for 553 acres of land. This patent is founded upon a purchase at the general sale of the lands of the United States, at Washington, Mississippi; under the authority of the before recited Act of Congress.

Upon this state of facts, the counsel for the defendant moved the Court to instruct the jury; "That in such a case, the older patent of the defendant under which he claimed possession, should prevail in the action of ejectment in a Court of Law, against the said junior patent of the plaintiff; although the said junior patent of the plaintiff emanated upon a prior certificate of the Board of Commissioners, west of Pearl river; but the Court refused to give such instructions in point of law to the jury, but on the contrary, instructed them, that the junior patent of the said plaintiff, emanating upon a certificate of a donation claim, prior in date to the patent under which the defendant claims, would overreach the patent of the defendant, and in point of law should prevail against such prior patent of the defendant."

These opinions having been affirmed upon appeal to the Supreme Court of the state, the object of this writ of error is to have them reviewed in this Court.

It has been objected, that this Court has not jurisdiction of the case. By the second section of the third article of the Constitution, it is declared, "That the judicial power shall extend to all cases arising under this Constitution, the laws of the United States and treaties made, or to be made under their authority, &c." By the 25th section of the Judiciary Act of 1789, made in pursuance of this provision of the Constitution, it is enacted "That a final judgment or decree in any suit, in the highest Court of law or equity of a state in which a decision in the suit could be had, where is drawn in question the construction of any statute of the United States, and the decision is against the title or right, &c., specially set up or claimed by either party, &c., under such statute, &c., may be re-examined and re-

versed or affirmed, by the Supreme Court of the United State upon a writ of error."

In this case, the titles of both parties are derived under a Act of Congress; the construction of the statute is drawn d rectly in question; and the decision of the highest Court Law of the state, is against title and right of the party, specia ly set up in his defence under the statute. This case is not dis tinguishable from the case of Matthews *vs.* Zane, 4 *Cranch*, 38 in which the jurisdiction of this Court was maintained.

For the plaintiff in error, it is argued, that the state Cou erred in deciding that the elder grant should not prevail in th action of ejectment.

It is undoubtedly true, that upon common law principles th legal title should prevail in the action of ejectment, upon th same grounds that the legal right prevails in other actions i Courts of Law. It is so held in those states in which the pri ciples of the common law are carried into full effect, and th course of proceeding in the action of ejectment are accordin to those principles. In the states where these principles pre vail, it is held, that in a trial at law the Courts will not lool behind, or beyond a grant, to the rights upon which it is found ed; nor examine the progressive stages of the title, anteceden to the grant.

But in other states, the Courts of Law proceed upon othe principles. In the action of ejectment, they look beyond th grant, and examine the progressive stages of the title, from i incipient state, whether by warrant, survey, entry, or certificat until its final consummation by grant; and if found regular an according to law, in these progressive stages, the grant is hel to relate back to the inception of the right and to have dignit accordingly.

This latter course, seems to be the one adopted and pursue by the Courts of Mississippi. It is enough for us to say, th in so doing, and in applying their peculiar mode of proceedin to titles derived through and under the laws of the Unite States, they violated no provisions of any statute of the Unite States.

The important question in the case is this: In applying i own principles and practice in the action of ejectment, as migh well be done to this case, has the Court misconstrued the A of Congress, in deciding that the grant of the plaintiff, emana ing upon the donation certificate of the Board of Commissio ers, west of Pearl river, set forth in the record, would overreac the defendant's grant, and should prevail against it in the a tion of ejectment?

This draws in question the construction of the Act of Co gress of 1803, and gives this Court jurisdiction of the case

It is well known, that prior to the treaty of San Lorenzo, of the 27th of October 1795, controversies had long existed between the United States and his Catholic Majesty, on the subject of the boundaries which separated the United States, and the Spanish provinces of East and West Florida. The second article of that treaty declares "That the southern boundary of the United States, which divides their territory from the Spanish colonies of East and West Florida, shall be designated by a line beginning on the Mississippi river, at the northernmost part of the thirty-first degree of latitude, north of the equator, which, from thence, shall be drawn due east to the middle of the river Appalachicola," &c. And it is agreed, that if there should be any troops, garrisons, or settlements of either party, in the territory of the other, according to the above mentioned boundaries, they should be withdrawn from the said territory, within the term of six months, after the ratification of this treaty, or sooner if it be possible.

It is matter of public history, that there were Spanish troops, garrisons, and settlements north of this boundary, and within the territory of the United States; which were not withdrawn, till long after the time stipulated by the treaty.

By the second section of the before recited Act of Congress, of the 3d of March 1803, it is enacted "That to every person, or to the legal representative or representatives of every person, who, either being the head of a family, or of twenty-one years of age, did, on that day of the year 1797, when the Mississippi territory was finally evacuated by the Spanish troops, actually inhabit and cultivate a tract of land in the said territory, &c. the said tract of land thus inhabited and cultivated, shall be granted, provided, however, that not more than one tract shall be thus granted to any one person, and the same shall not contain more than 640 acres; and provided that this donation shall not be made to any person who claims any other tract of land in the said territory, by virtue of any British, or Spanish grant, or order of survey."

The sixth section of the Act provides for the establishment of two Boards of Commissioners, one east and the other west of Pearl river, in said territory; "for the purpose of ascertaining the rights of persons claiming the benefit of the articles of agreement and cession between the United States and state of Georgia, or of the three first sections of this Act. And each Board, or a majority of each Board, shall, in their respective districts, have power to hear and decide in a summary manner, all matters respecting such claims; also to administer oaths and examine witnesses, and such other testimony, as may be adduced, and to determine thereon, according to justice and equity; which determination, so far as relates to any rights

derived from the articles of agreement aforesaid, or from three first sections of this Act, shall be final."

The eleventh section provides "That the lands for wh certificates of any description whatsoever shall have b granted by the commissioners, in purstrance of the provisi of this Act, shall, as soon as may be, be surveyed. And said surveyor shall cause all the other lands of the Uni States, in the Mississippi territory, to be surveyed."

And the twelfth section provides, that all the lands afo said, not otherwise disposed of or excepted, by virtue of provisions of the preceding sections of this Act, shall (w certain other reservations and exceptions) be offered for sal

As such lands only were authorized to be offered for sale, had not been appropriated by the previous sections of the l and certificates granted by the commissioners, in pursua thereof; it follows, incontestably, that the right of the pl tiff in the ejectment, derived from a donation certificate, is perior to that of the defendant, derived from a purchase at sales, unless there is some fatal infirmity in the certific which renders it void. This has not been contested.

But it is objected to this certificate:—

1. That it is not a donation certificate.

2. That it is not sufficiently precise, and does not aver the facts necessary to authorize the commissioners to gran certificate.

3. The period of occupancy, is alleged to be the 30th March 1798.

The answer to the first objection is, that the certificat granted for 640 acres of land, the precise quantity for wh a donation certificate was authorized.

This is sufficient evidence of the intention of the Board Commissioners, to grant a donation certificate. The perio occupancy, too, fits the case of a donation certificate, or no and, if necessary, fortifies the conclusion of its being gran as a donation certificate.

To the second objection, it may be answered, that the requires no precise form in the certificate. It is sufficien the proofs be exhibited to the Board of Commissioners, to tisfy them of the facts entitling the party to the certific The facts need not be spread upon the record. It is sufficie if the consideration, to wit, the occupancy, and the quan granted, appear.

Nothing more is necessary to certify to the government the party's right; or to enable him, after it is surveyed by proper officer, to obtain a patent.

The objection, that the occupancy is stated to be on 30th of March 1798, produces more difficulty.

(Ross vs. Doe on the demise of Barland et al.)

The language of the second section of the Act of Congress, authorizing these donation claims, is, that the persons, who *on that day of the year* 1797, *when* the Mississippi territory *was finally evacuated* by the Spanish troops, &c.

This language is very peculiar, and shows plainly, that, although Congress at the time of passing the law was certain of the *fact* of evacuation by the Spanish troops, that body was not informed of the precise time when the evacuation took place.

The law was intended to confer a bounty on a numerous class of individuals; and in construing the ambiguous words of the section, it is the duty of the Court to adopt that construction which will best effect the liberal intentions of the legislature.

To interpret this section literally, that land should be granted to those, who, on the same day of the year 1797 occupied a tract of land, provided the Spanish troops finally evacuated the territory, and on that very day of that very year 1797, would totally defeat the operation of the law, and the bounty intended by it; if it should have happened, that the final evacuation of the territory, by the Spanish troops, took place on the first day of January 1798, or on any subsequent day.

If an individual had inhabited and cultivated a tract of land every day in the year 1797, still, according to the letter of this section, he was not entitled to the bounty of the government, because the Spanish troops had not evacuated the territory *any day of that year*, but some day of the next year; and although the party continued to occupy the land until the day of the actual evacuation, still, he could not be entitled, according to the letter of the Act, because that day was not any day of the year 1797.

This could not be the intention of Congress. The country had been settled during the conflict on the subject of boundaries, between Spain and the United States, by the citizens and subjects of both governments. It was a weak and exposed frontier of the United States. The manifest general intent of the Act of Congress, is to confer a bounty upon the inhabitants and cultivators of the soil, who elected to remain in the country at the time of the actual evacuation by the Spanish troops. In this view of the subject, the time of the actual evacuation was very important, but whether it was on some day in the year 1797 or 1798, was comparatively unimportant.

If the fact be supposed, and it must be supposed for the sake of the argument, that the actual evacuation took place on the 30th of March, 1791, then something must be rejected in the construction and interpretation of the Act of Congress to make the provisions of the law effectual. Either the words

"*of the year* 1797" must be rejected as inconsisten
main scope and general intent of the law, or the cla
nations of all the inhabitants and cultivators, wes
river, must be defeated. This would but defeat th
general intent of the law.

It was said at the bar, that all the donation certifi
of the Pearl river express to be for occupancy on th
of March, 1798, and a certificate from the commi
the general land-office, to that effect, was produced
necessary to decide whether we can, or cannot, notic
tificate as evidence of the fact that the evacuation
on that day, or as evidence of the construction gi
Board of Commissioners west of Pearl river. It i
if they were authorized to give such construction t
in the event supposed, that the event happened; c
words, that the actual evacuation took place on t
March, 1798, as supposed in the argument; and th
struction of the 2d section of the Act of Congress,
are disposed to adopt, is the true construction in t
tion of Congress itself; we think, may fairly be infe
the Act of Congress of the 21st of April, 1806. Tl
tion of that Act provides, that "wherever it shall
the satisfaction of the register and the receiver of t
east of Pearl river, that the settlement and occupanc
of which a pre-emption certificate had been gra
commissioners, had been made and taken place p
30th of March, 1798, they shall be authorized to g
party a donation certificate, in lieu of such pre-emp

It appears, from this section, that the commissio
Pearl river had adopted the construction of the A
contended for by the plaintiff in error; and that,
granting donation certificates to the inhabitants a
down to the period of the 30th of March, 1798, u
section of the Act, they had granted pre-emption
under the provisions of the 3d section. Congress t
a mistaken construction of the law, by directing dc
tificates to be made out in lieu of the pre-emption c

The Act of 1803 puts the settlers east and west
ver on precisely the same footing, and it is inconce
Congress could have any motive for giving those e
river any preference by the Act of 1806; or that th
have any other object, than to continue upon the
ing the settlers east and west of Pearl river.

The certificate granted in the case before us, i
evidence that the commissioners west of Pearl rive
more liberal construction; such as we think they

ranted in adopting, and such as, we think, is manifestly sanctioned by Congress, in the Act of 1806.

It is the opinion of this Court, that the commissioners were authorized to hear evidence as to the time of the actual evacuation of the territory by Spanish troops, and to decide upon the fact. The law gave them "power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and to equity;" and declares their determination shall be final.

We are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that, consequently, it was shown to them; and the final evacuation of the territory by the Spanish troops took place on the 30th of March, 1798.

Upon the whole, it is the unanimous opinion of this Court, that the Supreme Court of the state of Mississippi has not misconstrued the Act of Congress, from which the rights of the parties are derived; and that the judgment of the Supreme Court be affirmed.

This cause came on, &c., on consideration whereof, It is the opinion of this Court that the Supreme Court of the state of Mississippi has not misconstrued the Act of Congress on which the plaintiff below relies; and it is therefore adjudged and ordered by this Court, that the judgment of said Supreme Court of the state of Mississippi be, and the same is, hereby affirmed, with costs.

ANN PRAY, EXECUTRIX, J. J. MAXWELL, AND GEORGE WATERS, EXECUTORS OF JOHN PRAY, DECEASED, APPELLANTS, *vs.* GEORGE G. BELT, TRUSTEE, AND JAMES P. HEATH, PRO. AMI.

The testator in his will says, "whereas my will is lengthy, and it is possible I may have committed some error or errors, I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they determine is my intention, shall be final and conclusive, without any resort to a Court of Justice." Clauses of this description have always received such judicial construction, as would comport with the reasonable intention of the testator. {679}

Even where the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, Courts of Justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of such a power so given in a will, one not foreseen, and which could not be intended by the testator, it has been considered as a case, in which the general power of Courts of Justice to decide on the rights of parties, ought to be exercised. {680}

There cannot be such a construction given to such a clause in a testator's will, as will prevent a party who conceives himself injured by the construction, from submitting his case to a Court of Justice. A Court must decide whether the construction of the will adopted by those who are named is the right construction, or the grossest injustice might be done. {680}

Where a legacy for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, the number in neither family being ascertained by the will, all the claimants ought to be brought before the Court. The right of each individual depends on the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed. If this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. {681}

APPEAL from the Circuit Court of the United States for the District of South Carolina.

The appellees, complainants in the Court below, on behalf of Jane Heath, the wife of James P. Heath, and of her children, filed a bill in the Chancery side of the Circuit Court of the United States for the District of South Carolina, against Ann Pray, executrix, J. J. Maxwell, and George Waters, executors of the last will of John Pray deceased, for the recovery of a legacy to which Jane Heath was entitled under the will.

The clauses of the will of John Pray, brought under the notice and consideration of the Court, and exhibited by the record were:

(Pray et al. vs. Belt et al.)

"Item 51. Whereas I hold ten bonds, given by John J. Maxwell, payable by ten instalments, the first on the tenth of January next, and the others on the tenth of January in each year after. It is my will, and I direct, that the bonds payable tenth of January, eighteen hundred and twenty, eighteen hundred and twenty-one, and eighteen hundred and twenty-two, say the three first, shall be applied in aid of the payment of my just debts, if any due, and in the payment of the legacies by me left. It is my request that my executors do also apply all funds which I may possess at my decease, as also dividends on all my bank stock, (except that part of dividends which I have directed to go immediately to some of my legatees,) and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton; first to pay any debts, and then legacies, any heretofore left, or which I may hereafter leave to be paid. It is my will, and I do direct, that my executors do pay up the one-half of all the cash legacies by me left to my relations, out of the first funds they can command from my estate, except those I may have directed to be paid immediately; and after they have paid the one-half to my relations, thereafter it is my will that they do pay up in equal proportions, agreeably to sums left, to all my other legatees; and be it understood, and it is my will and intention, that after they have paid the one-half, to my relations, that they will continue to pay them the other half in equal proportions with my other legatees; my object and intention is, to place them on the same footing with my other legatees, after the payment of one-half to my said relations. It is my will and request, that my executors do pay all my debts and legacies as soon as possible after my death; but be it explicitly and plainly understood, that no interest whatever is to be allowed on any legacy by me left to any one of my legatees, as in all probability the resources and funds of my estate will be equal to the payment of my debts and legacies before the three bonds mentioned of John J. Maxwell may fall due and be collected. In case all debts and legacies can be paid before the three aforesaid bonds can be collected, then, and in that case, whatever balance may remain to be collected on the three aforesaid bonds, principal and interest, it is my will, that the same shall be equally divided as collected, between the following persons, share and share alike: To my executors in trust, for the use and benefit of my aunt Turpin, my uncle's present wife; it is my intention to keep it from being subject to my uncle's debts, that I leave it in trust; in case of no risk, my executors will pay it over to my aunt. My god-daughter, Mary Jane Pray Hines, wife of Lewis Hines. The children of Thomas Mann, by his present wife, as also Ann and Jane, now in New-Providence. Any part

which the children of Harriet Mann, Thomas Mann's wife, may be entitled to, is to be ascertained by the number she may have at the time these *bonds are collected*, and my executors are ready to pay over. In case all is not applied on my debts and legacies, and if Harriet hath any child after the payment, then such child to receive such proportion as the other children out of the part paid to such as she before had or has at the time the same is paid. My executors will be governed in the distribution, by the number of children Harriet has on the day they are ready to make a distribution. In case of any surplus left on said bonds, the said children's parts to be paid to their legal representatives, so it is not their father; (I omitted the word Mann after the words Ann and Jane above,) and to *Richard K. Heath*, in trust for the benefit of *Jane Heath*, wife of James P. Heath, and such children as she may have when that surplus may be collected, in case of there being any."

"It is my will, and I direct, that all my estate, both real and personal, shall be kept and continued together, until all my just debts and legacies are paid, debts, if any, first, and as soon after as possible, to be disposed of as hereinafter directed."

"In case of accidents by fire, at any time before or after my executors pay my debts and legacies, it is my will that my wife receive the amount of insurance to aid in rebuilding; and in case of accidents by fire on lots in Nos. 6 and 7, before my debts and legacies are paid, it is my will, in such case, that my executors *hold all my estate together*, until they can add ten thousand dollars to what may be received on insurance; and they are requested to put on fire-proof buildings on said lots, to both these amounts, and if these sums are insufficient, they are authorized to raise any balance for erecting proper buildings, on the *credit* of my wife: this balance, if any required, be it understood, is to come out of my wife's *portion* of my estate left her.

"In case of such an accident, if necessary, in order not to delay re-building, my executors will resort to a loan from the bank or banks. Whereas there is no doubt but there must be a considerable surplus fund of my estate by debts due, or crops on hand, or near made, after my executors have paid *all my debts* and legacies, which my wife will come in for—if my executors discover that by such surplus that the same will not be equal to ten thousand dollars, in that case it is my will, that they continue all my estate together, until they can make up ten thousand dollars; and it is my request, that they will, as soon as possible after raising the aforesaid sum, proceed to put up fire-proof buildings on the aforesaid lots."

"Whereas my will is lengthy, and it is possible I may have committed some error or errors. I do therefore authorize and

empower, as fully as I could do myself, if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they may determine is my intention *shall be final and conclusive*, without any resort to a Court of Justice."

The defendants John J. Maxwell, and George M. Waters, in their separate answers allege, "That, in the month of December, in the year eighteen hundred and nineteen, the defendants, qualified as executors of the will of John Pray, and having ascertained that there was a sufficient sum of money to be raised from the crops which had been made that year, as also from debts due the estate of said John Pray, the testator, on bonds, notes, and other securities, which could soon thereafter be realized, to satisfy all the unpaid legacies of the said testator, commenced a delivery of some portions thereof to those claiming and entitled under the will. That, in the mean time, after they had commenced a division of the estate of said testator, and before its completion, to wit, on the tenth day of January, in the year eighteen hundred and twenty, the accident occurred, which had been guarded against by the sixty-first item of the will of said testator, as set forth in the complainant's bill; and the buildings on lots No. 6 and 7 were destroyed by fire; that, at the time when this event occurred, the debts of said testator, which were small, may have been, and as this defendant believes, were all paid and discharged, but the legacies remained partially unpaid and unsatisfied, although, as this defendant believes, at the time, and as previously stated in this answer, there was a sufficiency of funds to be realized from the means already pointed out, to discharge and pay the remaining unsatisfied legacies, and which the executors, when they commenced the division of the estate, as aforesaid, intended to apply to the payment of said unpaid legacies; that, previously, also, to the said conflagration, by which the said buildings on lots No. 6 and 7 were destroyed, the first bond of the said John J. Maxwell had been collected, and applied to the payment of the debts and legacies. That the funds, which were to be realized from the crops, bonds, and notes, as aforesaid, by the executors, and which had been deemed adequate to the payment of the unpaid legacies, were insufficient for that purpose, and the payment of the said ten thousand dollars bequeathed to the said Ann Pray in the said sixty-first item of said will, in the event of the destruction of the buildings on the said lots six and seven, which actually occurred: that the two remaining of the three bonds of the said John J. Maxwell, which were directed by the fifty-first item of the said will to be appropriated in aid of the payment of the said debts and legacies, were then resorted to by the executors, from which, in addition to the available ef-

fects already specified, a fund was realized equal to the payment of the legacies, and the sum of ten thousand dollars, which was appropriated to the use of said Ann Pray, as directed, in sixty-first item of said will; that the said appropriation of the two remaining bonds of the said John J. Maxwell, was made after the division of the estate had commenced, as already shown, but before its completion.

"That if the estate of the said testator had been kept together, after the conflagration aforesaid, a sufficient time, funds may have been realized sufficient to pay all debts and legacies, and to meet the aid authorized and directed for the said Ann Pray; but this defendant declares that it would have required the estate to have been kept together four or five years for this purpose, without resorting to the said bonds: in the mean time the said bonds would have become due, and been realized; the one being due on the — day of January, eighteen hundred and twenty-one, and the other on the — day of January eighteen hundred and twenty-two. That in and by the fifty-first item of the said will, the said bonds are expressly directed to be appropriated in aid of the payment of the debts and legacies, and only to be distributed among the legatees therein named, in the event of the debts and legacies being paid out of the funds, made subject by the will to that purpose, before the said bonds should become due or could be collected. That if the said estate of the said testator had been kept together until the necessary funds for the relief of the said Ann Pray, and the payment of the legacies had been raised from the annual proceeds, the benefit arising to the said Jane Heath and her children, by receiving their proportion of the real estate of said testator devised to them, must have been delayed four or five years; whilst, by the early division of said estate, they were greatly benefited, having realized, at that time, from this means three thousand five hundred dollars. And this defendant admits that the complainants have applied to the executors of said testator on the subject of the proportion of Jane Heath, in said bonds, and to which they supposed her entitled. That the division of the estate having been commenced, and a portion of the property delivered to the devisees and legatees, and a fund sufficient to pay the legacies, and which was to come into the hands of the executors, having been reserved for that purpose, they considered themselves bound in justice to the legatees and devisees, who had not received their proportion of the estate, to proceed in the completion of the division of the estate; and therefore conceived the estate, so far as regarded their power to continue it together until the ten thousand dollars could be raised to relieve the said Ann Pray, from the annual proceeds, as having been in effect divided."

2. No answer to the bill of the appellees was filed by Mrs. Pray.

The case was heard on the bills and answers, and the Circuit Court determined, that the executors had misapplied the proceeds of the bonds of J. J. Maxwell, on which the legacies claimed were charged; and that Mrs. Pray would have to refund to the value of the residue bequeathed to her, and, rateably, also, according to the interest and income of the property specifically bequeathed to her. An order of reference was made, and thereupon, the master was ordered to make certain statements of the condition of the estate, and of other facts necessary to a final decree.

These reports having been afterwards made by the master, the Circuit Court, on the 9th of May, 1826, made the following decree:

"This cause came on to be heard on the master's report, pursuant to a reference at the last term, on the following points: 1st. A statement of the debts due by the testator. 2dly. A statement of the pecuniary and other legacies, and how and when paid. 3dly. Of the funds applicable to the debts and legacies. 4thly. Of the receipts and expenditures of the executrix and executors. 5thly. Of the value of the residue bequeathed to Mrs. Pray. 6thly. Of the value or amount of the income which the estate would have produced, had it been kept together specifically. Of the several amounts claimed by these complainants, in behalf of those whom they represent as legatees, and his own views of the correctness of those claims, with reference to the principles on which they are calculated. And he, the said master, having duly made and submitted his report upon all the matters so referred to him, and it appearing from said report, that the proportion of the funds of the said testator, to which, under his will, the complainants are entitled, amounts to the sum of twelve thousand one hundred and eleven dollars, as by reference to said report of file in the registry of this Court will more fully appear.

"It is ordered, adjudged and decreed, that George M. Waters, and Jno. J. Maxwell, executors, and Ann Pray, executrix, do pay to the said complainants, the sum of twelve thousand one hundred and eleven dollars. And it is further ordered, decreed and adjudged, that the said sum, when collected by force and virtue of this decree, be paid into the hands of the clerk of this Court, and on the receipt of the said sum, he is hereby ordered and directed, so soon as the same can be effected, to invest the said sum in the purchase of United States' stock, or bank stock of the United States' Bank, as may appear most advantageous to the complainants; and it is further ordered, adjudged and decreed, that the defendants do pay the

costs of this suit, and interest on the principal sum decreed, to be computed from the service of this decree."

"WILLIAM JOHNSON."

By agreement of counsel, a part of the master's report was afterwards corrected, and the number of persons among whom the amount of John J. Maxwell's bonds were to be distributed, being accurately stated, the sum to which the complainants below were entitled, according to the principles of the decree of the Circuit Court, was found to be $9909, instead of $12,111, as stated in the report.

The case was argued by Mr. Berrien for the appellants, and by Mr. Key for the appellees.

The following points were made by the appellants:

1. There is no sufficient evidence, on which to found a decree for any specific sum.

2. The necessary parties were not before the Circuit Court.

3. The proceeds of the three bonds of John J. Maxwell, were well applied to the payment of debts and legacies, and among others, to the payment of the contingent legacy to Ann Pray.

4. The decision of the executors, is the will of the testator, by the express provision of the will; and cannot be questioned by the legatees.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This suit was brought in the Circuit Court for the district of Georgia, by George G. Belt, the trustee for Jane Heath and her children, who are infants, and by James P. Heath, husband of the said Jane, and father of her children, against the executors of John Pray, deceased, and Ann Pray, his widow, to recover a legacy bequeathed to them and others, by the said John Pray.

The executors resist the demand, on the principle that the bonds for which the suit is instituted, were required to pay the debts and legacies due from the testator, and to raise the 10,000 dollars to replace the buildings on lots 6 and 7, which were consumed by fire. They also contend, that their testator has submitted the construction of his will, absolutely, to their judgment, and that their decision against the claim of the legatees, is final.

The Circuit Court established the claim of the plaintiffs, and decreed to them the proportion of the three bonds, which was estimated to be their part.

From this decree, the executors have appealed to this Court.

In argument, several formal objections have been taken to the decree, which will be considered. The question on the

merits, depends on the construction of the will. The will is very inartificially drawn. It is in some parts rendered more confused than it would otherwise be, by a recurrence in different places to the same subject. In item 51, he says, in the first instance, that the three bonds which are the subject of controversy, "shall be applied in *aid* of the payment of his just debts, if any due, and in the payment of the legacies by him left." He adds, "It is my request, that my executors do *also* apply all funds which I may possess at my decease, as also dividends on all my bank stock, (except that part of dividends which I have directed to go immediately to some of my legatees,) and also to apply all moneys due to me, as soon as collected, and also all rents and crops of rice and cotton, first to pay any debts, and then legacies," &c.

The language of this part of the will, in relation to these bonds, shows an intention to apply them to debts and legacies, if necessary; but indicates, we think, the expectation that it would not be necessary. They are to be applied in *aid* of the payment of his just debts, and in the payment of legacies. They are then to aid another fund. That fund is afterwards described in terms, which show it to be a *large one*. There is some reason to suppose, from this part of the will, that these three bonds were not comprehended in it, because the testator introduces the enunciation of its items, by saying "it is my request that my executors do *also* apply all funds, &c." Again, he assigns as a reason for withholding interest from his legatees, "that in all probability the resources and funds of his estate, will be equal to the payment of his debts and legacies, before the three bonds mentioned of John J. Maxwell, may fall due and be collected."

This shows, unequivocally, the belief of the testator, that these bonds would not be required for the debts and legacies. He then adds, "in case all debts and legacies *can* be paid, before the three aforesaid bonds can be collected, then, and in that case, whatever balance may remain to be collected, shall be equally divided between the following persons," &c.

This bequest does not depend on the fact, that the debts and legacies should be actually paid, before these three bonds were collected, but on the sufficiency of the fund for the object. Should the fund be sufficient, its application must be made; and whether made in fact or not, the right to the bonds vests in the legatees.

The testator then proceeds to say, "it is my will, and I direct that all my estate, both real and personal, shall be kept and continued together, until all my just debts and legacies are paid."

This whole item, 51, shows the opinion, that the profits of

his estate, including dividends on his stock, added to the debts actually due at the time, were sufficient for the payment of debts and legacies. Yet his estate is to be kept together till they shall be paid. The profits are of course to be applied to that object. If this fund amounted, before the 10th day of January 1820, when the first bond from J. J. Maxwell fell due, to a sufficient sum for the payment of debts and legacies, the right of the legatees to the three bonds then vested;—if it was not sufficient on that day, it may be doubted, whether such part of the first bond as was necessary for this primary object, might be brought to its aid immediately. We suppose it might. A codicil to the will is dated the 18th day of June 1819, and the will and codicil were proved on the 27th of the succeeding month. The executors qualified in the month of December; having ascertained, they say in their answer, the adequacy of the fund provided for debts and legacies, they commenced the division of the estate.

So far as the will has been considered, it is obvious that the right of the legatees, to whom the two parts of the three first bonds due from Maxwell were bequeathed, was vested. Their right to the first bond may be more questionable. If part of the fund, which was applicable in the first instance to debts and legacies, could not be made available immediately, and the first bond or any part of it was substituted for debts which could not be collected, it cannot be doubted that those debts, when collected, ought to replace the bond so substituted. The testimony in the cause does not show, with sufficient certainty, how this fact stands. It is remarkable that this first bond was applied by the executors before the 10th of January 1820, when it became due. They state this fact in their answer. But we are decidedly of opinion, that this precipitate appropriation of the bond, could not affect the rights of the parties. They must remain, as they would have stood had the bond remained uncollected, till it became payable.

The contest in this suit would either not have arisen, or would have been confined to the first bond, had things remained as they stood before the 10th day of January 1820. But on that day the buildings on lots Nos. 6 and 7, were consumed by fire.

In that event, the testator had directed that his executors should, for the purpose of replacing the buildings, hold all his estate together until they can add 10,000 dollars to what may be received on insurance. He adds, "In case of such an accident, if necessary, in order not to delay re-building, my executors will resort to a loan from the bank or banks." "Whereas there is no doubt but there must be a considerable surplus fund of my estate, by debts due or crops on hand, or near

made, after my executors have paid all my debts and legacies, which my wife will come in for—if my executors discover that by such surplus that the same will not be equal to 10,000 dollars, in that case it is my will that they continue all my estate together until they can make up 10,000 dollars."

Instead of conforming to this direction of the will; instead of keeping the estate together; the executors have applied the remaining two bonds payable the 10th of January 1821, and the 10th of January 1822, to this object.

They say, that having commenced the delivery of the estate, before this event took place, they thought themselves bound to complete it; and considered themselves in the same situation as if it had been completed before the buildings were consumed.

Suppose this opinion to be correct, ought they not also to have considered the bonds as delivered? This also was a specific legacy; and after being vested, stands, we conceive, on equal ground with other specific legacies.

These bonds do not constitute the fund on which the testator charges these 10,000 dollars, in the unlooked for event that the surplus of his estate should not be sufficient to raise it. He does not charge this sum on the principal, but on the profits of his estate; and the whole is to be kept together in order to raise it. It is obvious from the whole will, that these bonds do not constitute a part of that surplus, comprehending debts; and in this particular part of it, when he speaks of debts, it is of debts due. No one of these bonds was due at the date of the will, or of the death of the testator.

It is then, we think, apparent, that the application of these bonds towards raising the sum of 10,000 dollars, was a misapplication of assets.

If the estate had really been delivered when the event occurred, the executors ought to have retained their rights upon it, to satisfy this contingent claim, and we presume that the property would have been liable to it in the hands of devisees and legatees.

But the plaintiffs in error contend, that should they have misconstrued the will of their testator, still their misconstruction binds the legatees, because the testator says: "Whereas my will is lengthy, and it is possible I may have committed some error or errors. I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they determine is my intention shall be final and conclusive without any resort to a Court of Justice."

Clauses of this description have always received such judicial

construction, as would comport with the
the testator.

Even when the forfeiture of the legac
be the penalty of not conforming to the
Courts have considered it, if the lega
rather as an effort to effect a desired
than as concluding the rights of the pa
ble use be made of the power, one no
could not be intended by the testator, it
a case in which the general power of C
cide on the rights of parties ought to be

This principle must be kept in view, i
now under consideration.

The acting executors, and executrix,
cases of dispute or contention, to deter
tion of the testator; and their decision i

This power is given, in the apprehen
committed error. It is to be exercised i
intent in such cases. It certainly does n
altering the will. It cannot be contended
protect the executors in refusing to pay
in paying to A, a legacy bequeathed to
deviation from the will. In such case,
medy of the injured party? Is he concl
the executors, or may he resort to a Co
answer can be given to these questions.
from the manifest intent of the testator,
an honest endeavour to find that intent;
as a fraudulent exercise of a power, gi
preserving peace, and preventing expensi
tion.

But who is to determine what is a gr
the will, if the party who conceives hin
submit his case to a Court of Justice?
brought before a Court, must not that C
rightly?

This is not the only objection which
must encounter, in supporting their con
The executors have not, we think, this
executrix.

It is given to a majority of the acting
to have a voice as executrix." Her pa
sion, is indispensable to its validity.

If this power was given to her solely,
ecutrix, it is seriously doubted whether
she assumes that character.

Even had she united with the executo

ly be a case which might well be considered as an exception from the general operation of the power. The bonds to which it was applied, are the bonds of one of the executors, and it was exercised by bestowing them on the executrix, instead of the persons to whom they were bequeathed by the testator.

In doing this, the executors have plainly misconstrued the will. The testator had not charged the $10,000, which were to be raised in order to rebuild the houses that were destroyed by fire, on these bonds, but on a different fund. It is, therefore, the very case put, of paying to the executors the legacy bequeathed to other persons. It may also be observed, that neither of the executors, nor Mrs. Pray, say in their answer, that this diversion of these bonds to a different purpose from that directed by the testator, was made from a belief that it was his intention, in the event which had occurred. They refer to the clause, and rely upon it, as if it had empowered them to do whatever they thought best, in the progress of their administration; instead of doing what, in their best judgment, they believed to be his intention.

But, however correctly the will of the testator may have been construed in the Circuit Court, and we think it was construed correctly, at least so far as respects the two last bonds mentioned in item 51 of the will of John Pray, deceased; other objections have been taken to the proceedings in the Circuit Court, which seem to be well founded.

The legacy for which this suit is instituted, is given jointly to several persons in different families. The legatees take equally, and the numbers in neither family are ascertained by the will. Under such circumstances, we think all the claimants ought to be brought before the Court. The rights of each individual depend upon the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed. If this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, that decree would not bind persons who were not parties. The case cannot be distinguished from the rule which is applied to residuary legatees.

The bill filed in this case, does not even state the number of persons belonging to the different families, nor to that family in whose behalf this suit is brought. Nor does it assign any reason for not making the proper parties. It does not allege that the other legatees refuse to join, as plaintiffs, or that they cannot be made defendants.

For this cause the decree must be reversed, and the case remanded to the Circuit Court, that the plaintiffs may amend their bill.

The objections to the report, are not entirely unfounded, i it is not quite satisfactory.

It does not, we think, show with sufficient clearness, w ther the plaintiffs in that Court were entitled to the first bo But as the case must go back to amend the bill, a new rep will of course be made; and if that shows, that the funds of t estate were sufficient to pay the debts and legacies, without plying this bond to that purpose, the plaintiffs below will entitled to that also.

This cause came on, &c., in consideration whereof, It is creed and ordered by this Court, that the decree of the Circ Court in this cause be, and the same is hereby reversed a annulled; and it is further ordered, that the cause be rema ed to the said Circuit Court, for further proceedings to be h therein, and that the plaintiffs may amend their bill.

WILLIAM B. ALEXANDER, FRANCIS SWANN, AND THOMAS SWANN, PLAINTIFFS IN ERROR, *vs.* ELISHA BROWN, DEFENDANT IN ERROR.

Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds, for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after *ten days' notice* to the obligors in the bond of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bond; if the notice given to the obligors, of the plaintiff's intention to proceed, is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution, may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favoured. {684}

ERROR for the Circuit Court of Alexandria.

This case was argued by Mr. Swann, for the plaintiffs, and Mr. Jones, for the defendant.

The material facts of the case appear in the opinion of the Court.

Mr. Chief Justice MARSHALL delivered the opinion of the Court.—

This was a motion to the Circuit Court for the District of Columbia, sitting in Alexandria, for an award of execution upon a forthcoming bond, taken in pursuance of the execution law of Virginia. That law directs, that if the owner of any goods or chattels, which shall be taken by virtue of a writ of *fieri facias*, shall tender sufficient security to have the same goods and chattels forthcoming, at the day of sale; it shall be lawful for the sheriff or other officer, to take bond from such debtor and securities, payable to the creditor, reciting the service of such execution, and the amount of the money or tobacco due thereon, and with condition to have the money or tobacco forthcoming, at the day of sale appointed by such sheriff or other officer; and shall thereupon suffer the said goods and chattels to remain in the possession, and at the risk of the debtor, until that time. And if the owner of such goods and chattels shall fail to deliver up the same, according to the condition of the bond, or pay the money or tobacco mentioned in the execution, such sheriff or other officer, shall return the bond to the office of the clerk of the Court, from whence the execution issued, to be there safely kept, and to have the force

of a judgment; and thereupon it shall be lawful for the Court, when such bond shall be lodged, upon the motion of the person to whom the same is payable, his executors or administrators, to award execution for the money and tobacco therein mentioned, with interest thereon from the date of the bond, till payment, and costs; provided the obligors, their executors or administrators, or such of them against whom execution is awarded, have ten days' previous notice of such motion.

In this case, the condition of the bond recited a *fieri facias* against William B. Alexander and Richard B. Alexander, but was levied on the property of William B. Alexander only. The bond was executed by William B. Alexander, and his sureties. The notice of the motion to award execution on this bond, was addressed to the obligors, and imported that the motion was to award execution on their forthcoming bond, bearing date, &c., and taken by virtue of a writ of *fieri facias* issued, &c. "in my name, against William B. Alexander, &c."

On the motion, the forthcoming bond, and the execution on which it was taken, were shown to the Court; and the proceedings were regular in all respects, except that the notice stated the bond to be taken by virtue of a writ of *fieri facias*, issued against William B. Alexander, whereas it was in fact issued against William B. Alexander and Richard B. Alexander. It was admitted, that this was the execution on which the forthcoming bond was taken, and the only execution in which the said William B. Alexander was a party.

The counsel for the defendants took exceptions to the notice, but the Court gave judgment on the motion; which judgment is brought before this Court by a writ of error.

The Act of Assembly prescribes, that the forthcoming bond shall recite the material parts of the execution on which it is taken, but gives no other direction respecting the notice, than that it shall be served ten days before the motion. Its sole purpose is to inform the party that the motion is to be made, thereby enabling him to show that the money has been paid; or, that for any other reasons, execution ought not to be awarded. If it gives him the information, which enables him to do this, it effects all the substantial purposes of justice. A false recital of the execution, would be fatal, because it might mislead the obligor; but in this case, the execution was against William B. Alexander, though not against him alone. He could not mistake the case in which the motion was to be made, because, it is admitted, that this was the execution on which the bond was taken, and the only execution in which the said William B. Alexander was a party.

After judgment has been rendered, an execution issued thereon and levied, the property restored to the debtor, on his bond

to produce it on the day of sale, and his failure to do so, we do not think that nice and technical objections to the notice, where every purpose of substantial justice is effected, ought to be favoured. The law only requires notice, and where the notice is sufficiently explicit, to render mistake impossible, we think it justifies the award of execution.

The judgment is affirmed, with costs and damages, at the rate of six per centum per annum.

RICHARD BIDDLE, ADMINISTRATOR &c. OF JOHN WILK
JAMES C. WILKINS.

The plaintiff, as administrator of W., had brought a suit in the Court of the United States, for the Western District of Pennsylva recovered a judgment; and upon this judgment, he instituted the District Court of the United States, of the state of Mississippi, the defendant in the original suit. The defendant pleaded, that Orphans' Court of Adams county, in the state of Mississippi, w defendant resided, he had been appointed the administrator of had continued to act in that capacity. Held, that the debt due u judgment obtained in Pennsylvania, by the plaintiff, as adminis W., was due to him in his personal capacity, and it was immater ther the defendant was or was not administrator of W., in the Mississippi. That would not, in any manner, affect the right plaintiff; and the plea tenders an immaterial issue, and is bad on rer. {691}

Where the Court in which judgment is rendered, has not jurisdicti the subject matter of the suit, or where the judgment upon which brought, is absolutely void, this may be pleaded in bar; or may, i cases, be given in evidence, under the general issue, in an action upon the judgment. {691}

The general rule is, that there can be no averment in pleading aga validity of a record, though there may be against its operation is upon this ground, that no matter of defence can be pleaded case, to a suit on a judgment which existed anterior to the jud {692}

It has become a settled practice in declaring in an action upon a ju not, as formerly, to set out in the declaration the whole of the p ings in the original suit, but only to allege generally, that the plai the consideration and judgment of that Court, recovered the su tioned therein, the original cause of action having passed *in rem tam.* {692}

In an action upon a judgment recovered in favour of an administra plaintiff is not bound to make a profert of the letters of admini That it is not necessary in actions upon such judgments, that th tiff name himself as administrator, follows, from his not being b make profert of the letters of administration; and when he does s himself, it may be rejected as surplusage. {692}

After judgment recovered in a suit by an administrator, the debt is the plaintiff in his personal capacity, and he may declare that the due to himself. {693}

ERROR to the District Court of the United States, Mississippi district.

This was an action of debt brought in the Court below a judgment obtained by the plaintiff as administrator a the defendant, in the District Court of the United Sta

the western district of Pennsylvania. The declaration was in the common form, averring the recovery by plaintiff as administrator, &c.

The defendant pleaded three pleas in bar. 1. *Ne unques* administrator. 2. That in January 1817, in the Orphans' Court of the county of Adams, in the state of Mississippi, the defendant was duly appointed sole administrator, and has continued to act in that capacity. 3. That the judgment was obtained *per fraudem*. The plaintiff replied to the third plea, on which issue was joined; and demurred specially to the first and second, assigning as causes of demurrer, 1. The said pleas set up matter which, if true, existed anterior to the judgment on which the suit was brought; and might have been urged, if effectual at all, against the original recovery. 2. The said matters should have been pleaded in abatement, and not in bar. 3. They contain averments against the record. 4. That the matters therein contained are immaterial, and could not be set up after judgment, to avoid its effect, in the state from which the record came. 5. They are in other respects uncertain, informal, and insufficient.

Joinder in demurrer. The judgment of the District Court was in favour of the defendant, sustaining both pleas as sufficient.

Mr. Coxe, for the plaintiff in error, contended.

1. The first plea is clearly defective. The plaintiff in his representative character, had sued in the state of Pennsylvania, and recovered a judgment. In this subsequent action brought upon that judgment, the demand is a personal one. He need not name himself administrator, but may sue and recover in his own name. *L. Ray.* 1215. *Doug.* 4. 2 *T. R.* 126. 2 *Phil. on Ev.* 290. He need not make profert of the letters of administration, and in this case no such profert is in fact made. Even in action for an escape out of execution, on a judgment obtained as administrator, he need not style himself administrator, nor make profert. *Hobart*, 38.

In such cases, if he do sue in the second action in his representative character, and so designate himself, it will be held mere surplusage, and can in no degree vary the relative rights of the parties. 1 *Ver.* 119. 16 *Mass.* 71. *Ib.* 533. It would be a bad plea, that plaintiff had not been appointed administrator in the state where the second action is brought, 16 *Mass.* 533, for in such case, his right to sue is derived from the judgment which he has obtained, and is wholly independent of the letter of administration. 9 *Cranch*, 151.

The judgment obtained in the District Court of Pennsylvania, is conclusive evidence of the representative character of

the plaintiff, as well as of the amount of the debt. At common law, in an action of debt on the judgment, or in *scire facias*, the defendant can plead nothing which existed anterior to the original judgment, or might have been pleaded in bar to the original recovery. 1 *Chit. on Pl.* 350. 8 *Johns.* 77. 2 *L. Ray.* 853. *Cro. Eliz.* 283. 6 *Com. Dig.* 306–7. *Tit. Plead.* 2 *D.* 1. A judgment obtained in one of the Courts of the Union, has the same validity in other Federal Courts, as a judgment in a state Court has at common law, within the same jurisdiction, or as it possesses under the Constitution and laws of the United States, in a sister state. Montford *vs.* Hunt, 3 *Wash. C. C. Rep.* 28. Bryant *vs.* Hunter et al. *Ib.* 48.

The true test by which the validity of the plea is to be settled, is to ascertain whether it would have been held good in an action brought on the judgment, in the same Court where the judgment was had. The cases already cited, are decisive of that question.

2. The second plea is open to the same objections which exist against the first, and is otherwise informal and defective. It is argumentative; the mere fact that he was appointed administrator of James C. Wilkins by the Orphans' Court in Adams county, furnishes no exemption from suit. It leaves the whole substance of the defence set up, to be made out by inference and argument, to wit; that plaintiff was not such administrator; which however, is only thus inferentially denied.

This, if substantially a defence, should have been pleaded to the original action; and therefore cannot avail the party in the present stage of the proceedings. Even if treated now as a plea to the original demand, it is essentially defective, inasmuch as it does not aver that the defendant had obtained letters of administration, prior to the institution of the suit in Pennsylvania. It would be a monstrous doctrine to introduce, that a party after a suit has been instituted against him in one jurisdiction, may defeat all the beneficial results of a judgment, by obtaining letters of administration in another state.

3. The first plea, which in terms traverses the fact that plaintiff is administrator, and the second, which argumentatively rests upon the same ground, are both bad as pleas in bar. In the case of Childress *vs.* Emory et al. 8 *Wheat.* 642, this Court recognised the doctrine that the objection that plaintiffs were not executors, must be taken advantage of by plea in abatement.

Mr. Baldwin and Mr. Jones for defendant.—

It will be admitted, that the first plea is defective, and no effort will be made to sustain the judgment of the District Court in reference to that.

The second plea is however considered as furnishing a valid

defence, and its character and effects have been wholly misapprehended by the adverse counsel. The demurrer admits that defendant was the sole administrator of Wilkins, from 1817, till the institution of this suit. Under the testamentary system of Mississippi, where he resided, a debt due to the deceased is assets in the hands of the administrator, and is included in the inventory, as so much money. The plaintiff sued as administrator, and defendant was at the time administrator within the jurisdiction in which the action was instituted. Every cause of action existing there, was necessarily embraced in the powers of the party, who was alone recognised there as the personal representative of the deceased. He was bound there to account for it—and to distribute it. He was prohibited by law from sending the assets out of the state. He could not legaily pay any debt without the sanction of the Court. That which he is prohibited from doing directly, he will not be compelled to do indirectly. If sued by creditors, and distributees, upon his official bond, he must be responsible to them for the whole amount of the inventory; and he cannot be discharged by showing payment to plaintiff.

There is no such thing as an auxiliary administration. 9 *Mass.* 355. Each administrator is independent of the author; each derives his power from a competent authority, and each is independent of the other within his own sphere. The residence of the deceased may determine the rule of distribution, and the relative rights of those entitled to the estate; but the concession that final distribution is to be made according to the law of Pennsylvania, though the record is wholly silent as to the place of his residence, leaves the question before the Court entirely open.

But the Courts in Pennsylvania have no jurisdiction over the defendant. He derives his power from the Mississippi Court. To it, and to it alone is he responsible. He cannot be cited to account, or to pay over to creditors, or distributees there—all this is to be done in Mississippi.

This debt, therefore, which the defendant is answerable for in his own state, and in the manner prescribed by the local law, cannot be assets in the hand of the Pennsylvania administrator.

The objection of the plaintiff that these matters existed anterior to the first judgment, and should have been pleaded in bar to the first action, is inapplicable. It is admitted that the record is conclusive, upon all the matters which the judgment professes to decide. But if the Pennsylvania Court had no cognizance of the subject matter, if it belonged exclusively to another tribunal—if the alleged debt or claim was exclusively

within the jurisdiction of the Orphans' Court of Mississippi, or if defendant acted in such a capacity, that no Court of common law jurisdiction could decide between the parties upon the subject matter of controversy, then the question presented is one of jurisdiction, and it is well settled that a Court, when called upon to enforce the judgment of another tribunal, may examine into and decide upon the question of jurisdiction. 4 *Cranch*, 269.

The District Court of Pennsylvania has admiralty jurisdiction; if this suit was brought on an admiralty decree, or on a stipulation, or on a bond to the marshal, and it should appear on the record, that the admiralty had no jurisdiction over the original cause of action, set forth in the libel, the objection might be urged any where, and at any time. The whole proceedings would be a nullity. 3 *Cranch*, 331.

So if the objection on this ground appeared incidentally, the effect would be the same. In this case then, the plea discloses a case beyond the proper jurisdiction of the Court in Pennsylvania, and this we are permitted to do with effect.

It is said these matters should have been pleaded in abatement, and not in bar. Pleas in abatement are such as go to the place where suit is brought, to any personal privilege of defendant, or to the form or species of action. If the party fails to plead in abatement, it is a submission to the process, and admits the jurisdiction, so far as that he is rightfully before the Court. But if the plaintiff cannot sue any where, if his cause of action is not cognizable in the Court where he sues, even express consent cannot give jurisdiction. The objection is fatal, and wherever it is shown to exist.

Mr. Justice THOMPSON delivered the opinion of the Court.—

This case comes up from the District Court of the United States, for the Mississippi district, upon a writ of error.

The action, in the Court below, was founded upon a judgment obtained in the District Court of the United States for the western district of Pennsylvania, in the term of October, in the year 1823, for the sum of 32,957 dollars and 34 cents. The declaration is in the usual form of an action of debt on a judgment.

The defendant pleads in bar—1. That the plaintiff is not, and never was, administrator of John Wilkins, deceased. 2. That at the January Term, in the year 1817, of the Orphans' Court for the county of Adams, and state, (then territory,) of Mississippi, he, the defendant, was duly appointed sole administrator of John Wilkins, deceased, and entered into bond with security, and took the oath prescribed in such case, according to the sta-

tute in such case made and provided; and that he took upon himself the duty and office of administrator, and has continued to act as such administrator ever since. 3. That the judgment in the declaration mentioned, was obtained by fraud.

To the two first pleas a special demurrer was interposed, and issue to the country taken upon the third, and judgment rendered for the defendant, upon the demurrer; to reverse which, the present writ of error has been brought.

The first plea of *ne unques administrator*, has been abandoned, as altogether untenable; and the counsel on the part of the defendant in error, have rested their argument entirely on the validity of the second plea; and have treated this as a plea in bar to the jurisdiction of the Court, in which the judgment was rendered. It is a little difficult to discover what is the true character of this plea. It can, in substance, amount to nothing more than an allegation that the plaintiff was not the lawful administrator of John Wilkins. And in that respect, is but a repetition of the same matter set up in the first plea, and that too, in a more exceptionable form. For, the conclusion is drawn argumentatively from the fact set up in the plea, that he, the defendant, was duly appointed sole administrator of John Wilkins, in the Orphans' Court of the county of Adams in the state of Mississippi; and thence to infer, that the plaintiff could not be the lawful administrator in Pennsylvania. Such a plea will not stand the test of a special demurrer. If it was intended by this plea, to set up that the defendant was the first, and only rightful administrator of John Wilkins, and that the debt due from him, thereby became assets in his hands; the plea is defective, in not alleging when administration was granted to the plaintiff. The declaration alleges, that John Wilkins died a citizen of Pennsylvania; and from any thing that appears to the contrary, administration might have been granted to the plaintiff, before it was to the defendant.

The simple fact, that administration had been granted to the defendant in Mississippi, would not raise any question with respect to the jurisdiction of the Court; and if it furnished any matter of defence on the merits, against the recovery, on the ground that it was taking out of his hands assets, the administration of which belonged to him, it should have been set up in the original action. Nothing appears to invalidate the judgment upon which the present action is founded. The cause of action does not appear, and we cannot say that the subject matter was not within the jurisdiction of the Court, when it was rendered; or that there was any disability in the plaintiff, to sue in that Court; or that the judgment was void for any cause whatever. When the Court in which the judgment is render-

ed has not jurisdiction over the subject n
when the judgment is absolutely void, thi:
bar, or may in some cases be given in evi
neral issue. But the general rule is, that t
ment in pleading against the validity of a
may be against its operation. And it is u
no matter of defence can be pleaded in
isted anterior to the judgment. (*Chitty Pl*
has become a settled practice in declarin
a judgment, not, (as formerly,) to set out
whole of the proceedings in the former su
generally, that the plaintiff, by the consid
of that Court, recovered the sum mentic
354.)

The original cause of action having pass
how far the circumstance, that the defe
letters of administration in Mississippi,
a defence against a recovery of the origi
now be inquired into. It should have beer
suit. But if the first administrator acquir
as assets, and that matter was now open t
thing appearing on this record, to show t
acquired any such priority. When lett
were taken out by the plaintiff, does not
bound to show that in his declaration.
make profert of the letters of administ
decided in the case of Crawford, admir
vs. Whitall. (*Doug.* 4, *note a.*) It was a
assumpsit, upon a judgment recovered by t
istrator, against the defendant, in the May
ta. And the declaration alleged, that the
ed to the plaintiff, as administrator, in the
ed, which had been adjudged to him a
The defendant demurred specially, and sh
there was no profert of letters of administ
said this was unnecessary, because in th
judgment,) the plaintiff had no occasion t
administrator. If then it was a fact, and
deciding the legal rights of the parties
ministration had been first granted to the
sippi, that should have been alleged in th
tion can be taken to the declaration, as co
in pleading.

That it is not necessary, in cases like
plaintiff to name himself as administrato
of course from his not being bound to m

ters of administration, and that when he does so name himself it may be rejected, as surplusage, is well settled by numerous authorities. In the case of Bonafous *vs.* Walker, (2 *Term Rep.* 126) it was objected that the action ought to have been brought by the plaintiff as *administratrix*; because the judgment on which the party had been committed in execution, had been obtained by her as administratrix of her husband. But the Court said, that was unnecessary, for the instant the plaintiff recovered the judgment, it became a debt *due her*, on record, and was assets in her hands, for which it was not necessary for her to declare as administratrix. (See also *Hob.* 301, *L. Ray.* 1215.) The case of Tallmadge administrator, &c. *vs.* Chappel and others, (16 *Mass. Rep.* 71,) decided in the Supreme Judicial Court of Massachusetts, is very full and explicit on this point. The plaintiff declared as administrator, &c. in debt upon a judgment recovered by him as administrator, in a Court of Common Pleas, in the state of New-York. The defendant pleaded in bar, that the parties at the time of rendering the judgment, were all inhabitants of the state of New-York, and that the plaintiff was appointed administrator in that state, and had not been so appointed in Massachusetts. To which plea, there was a demurrer and joinder, and the Court held the plea bad. That the action, being on a judgment already recovered by the plaintiff, it might have been brought by him in his own name, and not as administrator. For the debt was due to him, he being answerable for it to the estate of the intestate, and it ought to be considered as so brought; his style of administrator, being merely descriptive, and not essential to his right of recovery. That it was important to the purposes of justice, that it should be so; for an administrator appointed in Massachusetts could not maintain an action upon this judgment, not being privy to it; nor could he maintain an action upon the original contract, for the defendants might plead in bar, the judgment recovered against them in New-York. The debt sued for is, in truth, due to the plaintiff, in his personal capacity, and he may well declare, that the debt is due to himself.

If in the case before us, the judgment is considered a debt due to the plaintiff in his personal capacity, it is totally immaterial, whether the defendant was or was not administrator of John Wilkins, in the state of Mississippi. That could not, in any manner affect the rights of the plaintiff. The plea therefore, tenders an immaterial issue, and is bad on demurrer.

In whatever light, therefore, we consider this plea, whether as to the matter itself set up, or to the manner in which it is pleaded, it cannot be sustained as a bar to the present action.

We are accordingly of opinion, that the judgment of the

Court below must be reversed, and the cause sent back with directions to allow the defendant to plead *de novo* if he shall elect so to do.

This cause came on &c., on consideration whereof, It is adjudged and ordered by this Court, that the judgment of the District Court in this cause be and the same is hereby reversed and annulled, and it is further ordered that the cause be remanded to the said District Court, with directions to permit the defendant to plead *de novo*, if he elect so to do.

END OF VOLUME I.

INDEX

OF THE

PRINCIPAL MATTERS.

ABANDONMENT UNDER A POLICY OF INSURANCE.

The right to compensation from Spain, under the Florida treaty, held under an abandonment made to the underwriters upon vessels and cargoes illegally captured; passed by the assignment under the Bankrupt laws, and vested in the assignees. *Comegys et al.* vs. *Vasse.* 219.

ACKNOWLEDGMENT OF DEEDS.

1. Deeds.
2. Feme Covert.
3. Recording of deeds.

ACTIONS.

When an action is in its origin instituted in the name of A, for the use of B, the *cestuy que use*, is, by the law of Maryland, regarded as the real party to the suit. *Gaither* vs. *The Farmers and Mechanics Bank of Georgetown.* 42.

ADJUTANT AND INSPECTOR GENERAL OF THE ARMY OF THE UNITED STATES.

Army of the United States, 1, 5.

ADMINISTRATOR.

After the recovery of a judgment by an administrator, it is not necessary in a suit upon the judgment that he shall sue as administrator, the debt on the judgment being due to him personally; and if in such suit he shall name himself as administrator, it will be surplusage. *Biddle adm.* vs. *Wilkins.* 686.

AFFIDAVIT.

Evidence, 20, 21.

AGENT.

It is believed to be a general rule, that an agent, with limited powers, cannot bind his principal, when he transcends his power. It would seem to follow, that a person transacting business with him, on the credit of his principal, is bound to know the extent of his authority; yet, if the principal has, by his declarations or conduct, authorized the opinion, that he had given more extensive powers to his agent, than were in fact given, he would not be permitted to avail himself

AGENT.

of the imposition, and to protest bills, the drawing of which his conduct had sanctioned. *Schimmelpennich et al.* vs. *Bayard et al.* 290.

AGREEMENT.

1. Equity, 3, 4, 5.
2. When property conveyed in trust, to be sold at public auction, had been sold by private contract, and the property was afterwards offered for sale in the manner prescribed by the deed of trust, for the purpose of making a title to the private purchaser; at which time, more was bid for the same, than the amount for which it had been privately contracted to be sold; the purchaser, by private contract, to whom possession was delivered, at the price agreed on, cannot allege that the sale was void; since, whatever may be the liability of the *cestuy que trust*, to those interested in the proceeds of the sale, for the amount offered at the auction; it is not an objection, on the part of the purchaser, to release him from his contract. *Greenleaf* vs. *Queen et al.* 146.
3. Equity, 10.

ARBITRAMENT.

Award.

ARMY OF THE UNITED STATES.

1. The Adjutant and Inspector General of the Army of the United States, was not entitled to double rations, from the 30th September 1818, to the 31st May 1821. *Parker* vs. *the United States.* 296.
2. The President of the United States, has a discretionary power to allow such additional number of rations, to officers commanding at separate posts, as he may think just, having respect to the special circumstances of each post. The law granting this authority, is not imperative; and in the exercise of his discretion, the President may allow or refuse to allow, additional rations, as in his opinion he may deem proper. *Ibid.* 296.
3. The Secretary of War, as the legitimate organ of the President, under a general authority from him, may exercise the power, and make the allowance, to officers having a separate command. *Ibid.* 297.
4. No officer is entitled to the additional allowance, unless he be a commandant at a separate post; and then the claim must be sanctioned by the Executive. The allowance cannot be made to more than one officer at the same station. *Ibid.* 297.
5. In the discharge of his ordinary duties, the Adjutant and Inspector General, has no distinct command; his duties consist in details of service, and not in active military command. *Ibid.* 297.
6. An officer may be said to command at a separate post, when he is out of the reach of the orders of the commander in chief, or of a superior officer in command, in the neighbourhood. He must then issue the necessary orders to the troops under his command, it being impossible to receive them from a superior officer. *Ibid.* 297.
7. The general order of the War Department, of 16th March 1816, directing double rations to be allowed to officers commanding *military departments*, is construed to relate to the geographical sections of country, into which the two divisions of the army are divided, and which were denominated "departments," and intended to designate the extent of actual command given to the officer commanding each department; it does not relate to the law of the 3d of March 1813,

ARMY OF THE UNITED STATES.

"for the better organization of the General Staff of the Army." *Ibid.* 297.

ASSIGNMENT.

1. In general, it may be affirmed, that mere personal torts, which die with the party, and do not survive to his personal representatives, are incapable of passing by assignment; and that vested rights, *ad rem* and *in re*, possibilities coupled with an interest and claim, growing out of, and adhering to property, may pass by assignment. *Comegys et al.* vs. *Vasse.* 213.
2. The law gives to the act of abandonment, to underwriters, when accepted, all the effects which the most accurately drawn assignment would accomplish. The underwriter then stands in the place of the insured, and becomes legally entitled to all that can be recovered from destruction. *Ibid.* 214.
3. It is clear, that the right to compensation for damages and injuries, to which citizens of the United States were entitled, and which, under the treaty with Spain, were to be the subjects of compensation; passed by abandonment to the underwriters upon property, which had been seized or captured. *Ibid.* 215.
4. The right to indemnity for an unjust capture, on the sovereign; whether remediable in his own Courts, or by his own extraordinary interposition, or grants upon private petition, or upon public negotiation; is a right attached to the ownership of the property itself, and passes by cession to the account of the ultimate sufferer; and is afterwards assignable by the person to whom it had been ceded. *Ibid.* 215.
5. It is not universally, though it may be ordinarily, the test of a right, that it may be enforced in a Court of Justice. Claims and debts due by a sovereign, are not commonly capable of being so enforced. It does not follow, that because an unjust sentence cannot be reversed, that the party injured has lost all right to justice, or all claim, upon principles of public law, to remuneration. *Ibid.* 216.
6. The right to compensation from Spain, held under abandonment made to underwriters, and accepted by them, for damages and injuries, and which were to be satisfied under the treaty, by the United States; passed to the assignees of the bankrupt, who held such rights by the provisions of the bankrupt law of the United States, passed April 4, 1800. *Ibid.* 219.

ATTACHMENT.

1. The defendant in error had sued out an attachment, under the law of Maryland, against Robert Barry, and had filed an account against James D. Barry, said to have been assumed by Robert Barry, the plaintiff in error. Robert Barry appeared, gave special bail, and discharged the attachment. The plaintiff below, then filed a declaration of "*indebitatus assumpsit*," "for money had and received," and "for goods sold and delivered," to which Robert Barry pleaded the general issue. The parties went to trial, and a verdict and judgment were rendered for the defendant in error.
2. The Court attaches no importance to the variance between the account filed when the attachment issued, and the declaration filed after the attachment was dissolved, by the entry of bail, and the appearance of the defendant. The defendant having pleaded to the declaration,

ATTACHMENT.

the cause stood as if the suit had been b
and no reference can be had to the pro
Barry vs. *Foyles*. 315.

AWARD.

1. There is a class of cases, upon awards, tc
which arbitrators have been held to mor
pursuing the terms of the submission, a
veral distinct mattters submitted, upon t
being conditional, *ita quod*. But the ru
this qualification ; that in order to impea
ance of a conditional submission, on the
matters in controversy having been deci
ly show, that there were other points in
notice was given to the arbitrators ; and
termine them. *Kurthaus* vs. *Ferrer et al.*
2. It is a settled rule in the construction of
shall be indulged to overturn an award,
be allowed to uphold it. *Ibid.* 228.
3. If a submission be of all actions real and
only of actions personal, the award is g
ed, no actions real were depending bet

BANKRUPT AND BANKRUPTCY

The right to compensation from Spain, held
underwriters, and accepted by them, for
were to be satisfied under the treaty, b
to the assignees of the bankrupt, who h
sions of the bankrupt law of the United
Comegys et al. vs. *Vasse*. 219.

BILLS OF EXCHANGE.

1. The deposit of a bill in one bank, to be
collection, is a common usage, of great pu
of which is well understood ; and the du
a bill for collection, is precisely the same,
thereof ; and, if it was unwilling to unde
precise information on the subject, the d
clined. *The Bank of Washington* vs. *T*
2. By failing to demand payment of a bill he
would make the bill its own, and woul
owner for the amount. *Ibid.* 31.
3. The allowance of days of grace for the pay
or note, is now universally understood to
of a mercantile character ; and so, to form
the bill does not become due until the la
4. It is the usage of the Bank of Washington
district of Columbia, to demand payme
the last day of grace ; and this usage has
cisions of this Court. This usage is equa
were not acquainted with its existence,
the bank governed by such usage, to mal
32.
5. The usage of the place on which a bill is d

demanded, uniformly regulates the number of days of grace which must be allowed. *Ibid.* 34.

6. The failure of a bank holding a bill payable after date for collection, to give notice to the drawer, that the drawee was not found at home, when called upon to accept the bill, is not such negligence as discharges the drawer from his liability. *Ibid.* 35.
7. A bill of exchange, payable after date, need not be presented for acceptance before the day of payment; but, if presented, and acceptance be refused, it is dishonoured, and notice must be given. The absence from his home, of the drawee of a bill payable after date, when the holder of a bill, or his agent, call with it for acceptance, is not a refusal to accept; but such absence, when the bill is due, is a refusal to pay, and authorizes a protest. *Ibid.* 35.
8. In a suit instituted by the holder of a bill, against the bank, for negligence, in relation to demand, or notice of non-payment of the bill, the Court, although required, are not bound to declare the law as between the holder and the drawer. The bank was the agent of the holder, and not of the drawer, and might, consequently, so act, as to discharge the drawer, without becoming liable to its principal. *Ibid.* 36.
9. A stranger to the drawer and endorser of a non-accepted bill of exchange, may intervene *supra* protest, to pay the same for the honour of an endorser or drawer. *Konig* vs. *Bayard et al.* 262.
10. It is no objection to this intervention, that it has been done at the request and under the guarantee, of the drawees of the bill; who had refused to accept or pay the same. The arrangements made by the payer of the dishonoured bill, with the drawee, by which he was to be protected from loss, do not affect the liability of the party to the bill for whose honour it has been paid. *Ibid.* 262.
11. If A, at the request of the drawee of a bill of exchange, and under his guarantee, accept and pay the bill, *supra* protest, for the honour of the endorser, the party against whom suit is brought for the amount paid may avail himself of every defence which he could have had, if the bill had been paid *supra* protest for the honour of the endorser, by the drawee, and suit brought for the same. *Ibid.* 262.
12. The Court confirm the principle established in the case of *Coolidge* vs. *Payson*, 2 *Wheat.* 75, that a letter, written within a reasonable time before or after the date of a bill of exchange, describing it in terms not to be mistaken, and promising to accept it; is, if shown to the person who afterwards takes the bill, on the credit of the letter, a virtual acceptance, binding the person who makes the promise. *Schimmelpennich et al.* vs. *Bayard et al.* 283.
13. If the drawees of a bill of exchange, who refuse to honour the bill, and thus deny the authority of the drawer to draw upon them, were bound in good faith to accept or pay the bill as drawees, they will not be permitted to change the relation in which they stood to the parties on the bill, by a wrongful act. They can acquire no right, as the holders of the bill paid *supra* protest, if they were bound to honour it in the character of drawees. *Ibid.* 285.
14. A bill of exchange was drawn against shipments made to the drawee, but no letter of advice was written by the shipper to the consignees of the property, and drawees of the bill, ordering the proceeds of the shipment to be applied to the discharge of the bill; but directions were given to charge the bill, generally, to the account of the

BILLS OF EXCHANGE.

shipper; held that the drawees were not bound to accep bill, in consequence of the proceeds of the shipment bei by them. *Ibid.* 286.

15. A merchant has a right, by the usage of trade, to dra placed in the hands of the drawee, by shipment; and th must pay the bills, if the shipment places funds in his h 288.

16. Promissory notes, *passim*.

BILLS OF LADING.

1. By the well settled principles of commercial law, the cons authorized agent of the owner, whoever he may be, to goods; and by his endorsement of the bill of lading to a b chaser, for a valuable consideration, without notice of interest, the latter becomes, as against all the world, the goods. This is the result of the principle, that bills o transferable by endorsement, and thus may pass the prope vs. *The Atlantic Insurance Company*. 445.

2. Strictly speaking, no person but the consignee can by ment on the bill of lading pass the legal title to the goo the shipper be the owner, and the shipment be on his and risk, although he may not pass the title by virtue of dorsement of the bill of lading, unless he be the consi goods be deliverable to his order; yet, by an assignmen of lading, or by a separate instrument, he can pass the the same; and it will be good against all persons, except for a valuable consideration, without notice, by endorse bill of lading itself. Such an assignment by the owne legal title against his agents or factors, and creditors, in f assignee. *Ibid.* 445.

BONDS.

Pleas and pleading. 8.

BOTTOMRY AND RESPONDENTIA.

See respondentia.

CHANCERY AND CHANCERY PRACTICE.

1. Where a bill had been filed against a trustee, of real estat his death, administration had been granted to A; who, on of creditors, interested in the trust, was also appointed b the substituted trustee; and the Court went on to decre *trustee*, should execute certain conveyances; the decree be invalid; the course of proceeding, being rather to mak against A, in the character of administrator, because he administrator, under a title derived from the original trus the person designated by law, to represent him; or th mental bill, in the nature of a bill of revivor, should hav against the substituted trustee; in which all the proceed have been stated, and he required to answer the charg in the original and supplemental bill. *Greenleaf* vs. *Quee*

2. A decree of a Court of Chancery, is erroneous, which, af certain acts to be done, to enable a party to execute ce assigned to him, dismisses the bill, as it puts the cause o and renders the decree ineffectual: and it is no answer t

tion, that it appears by the record, in the case, that the acts ordered to be done, have been performed; since the error is in the decree itself, and not in its execution. *Ibid.* 148.

3. A bill may be dismissed, where the plaintiff, when called upon to make proper parties, refuses, or is guilty of unreasonable delay, in doing so; but this must be done, on demurrer, plea, or answer, pointing out the person or persons, whom, the defendant insists, ought to be made parties. *Ibid.* 149.

4. When a debtor had conveyed to a trustee, real estate, to be sold for the benefit of creditors, and the trustee dying before the conveyance of the property to a purchaser, another trustee was appointed by the Court, upon the application of the creditors, to execute the trust; in a proceeding, relative to the execution of the trust, and the conveyance of the estate, it is necessary that the heirs at law, of the first trustee, shall be parties to the same, as the legal title to the estate did not pass to the substituted trustee, by the appointment, but remained in the legal heirs. *Ibid.* 149.

5. A Court of Chancery, is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg* vs. *Baker.* 236.

6. After an answer and discovery, the rule is, that a suit brought, merely for discovery, cannot be revived. The object is obtained, and the plaintiff has no motive for reviving it. *Ibid.* 236.

7. A bill had been filed originally for discovery, and afterwards became a bill for relief. The relief prayed for, was a forfeiture; which might be enforced at law. Under such circumstances, it was proper to dismiss the bill, so far as it sought for relief against the forfeiture; but the dismission should have been without prejudice to the legal rights of the parties, as an absolute dismission might be considered as a decree against the title the plaintiff claimed, and which, by the bill and the evidence obtained under it, he sought to establish. *Ibid.* 236.

8. If, in a case where the *loss* of a deed or other instrument, is made the ground for coming into a Court of Equity, for discovery and relief, an affidavit of its loss must be made and annexed to the bill, and the absence of such affidavit is good cause of demurrer to the bill; yet, if the party charged by the bill failed to demur for the cause, but answered over to the bill, or permitted it to be taken for confessed, by default, against him; it *seems*, that the absence of the affidavit is not a sufficient cause for the reversal of the decree. *Findlay et al.* vs. *Hinde and Wife.* 244.

9. Where, in a bill filed for discovery and relief, the party relied upon a deed said to have been lost, but which had never been formally executed to convey the real estate; and upon a receipt of the purchase money, binding the party to convey the estate; the person alleged to have executed the lost deed, and who gave the receipt, should have been made a party to the proceeding; although he had, subsequently, by a legal and formal conveyance, duly executed, conveyed the estate to others; and thus, so far as he could, divested himself of all title in the same. *Ibid.* 246.

10. The decree of the Circuit Court directed two of the defendants, in whom was the legal title to the lot of ground claimed by the plaintiff in the bill, to convey the same; and awarded costs, generally, against all the defendants. All the defendants appealed together, to this Court, some of whom held the legal title to the lot, and all the defendants, had an interest in defending this title, standing as they did,

CHANCERY AND CHANCERY PRACTICE.

in the relation of vendors and warrantees, and vendees. Altho the defendants, against whom there is a decree for costs only, c not appeal from this decree for costs; yet, the reversal of the de of the Circuit Court was made general, as to all of the appellants, the whole case opened. *Ibid.* 247.

11. Although it seems to be a general rule, that a Court of Chancery not decree a specific performance of contracts, except for the p chase of lands, or things which relate to the realty, and are of a p manent nature; and that where contracts are for chattels, and c pensation can be made in damages, the parties may be left to t remedy at law; yet, notwithstanding this distinction between p sonal contracts for goods, and contracts for lands, there are m cases to be found, where specific performance of contracts relatin personalty, have been enforced in chancery; and Courts will o weigh with greater nicety, contracts of this description, than suc relate to lands. *The Mechanics Bank of Alexandria* vs. *Louisa Maria Seton.* 305.

12. Although an objection, for want of proper parties, may be take the hearing, yet the objection ought not to prevail upon the fi hearing of an appeal; except in very strong cases, and where Court perceives a necessary and indispensable party is wanting. *I* 306.

13. All persons materially interested in the subject of a suit in chance ought to be made parties, either plaintiffs or defendants; but this a rule established for the convenient administration of justice, and more or less within the discretion of the Court; and it should be stricted to parties whose interests are in the issue, and to be affect by the decree. The relief granted will always be so modified, as to affect the interests of others. *Ibid.* 306.

14. It is a well settled rule, that a Court is not bound to take notice any interest acquired in the subject matter of the suit, pending t dispute. *Ibid.* 310.

15. If a bill charges a defendant with notice of a particular fact, an swer must be given without a special interrogatory to the matt But, a defendant is not bound to answer an interrogatory, not w ranted by some matter contained in a former part of the bill. *T Mechanics Bank of Alexandria* vs. *Lynn.* 383.

16. The rules which govern the practice of the Circuit Courts in Ch cery, have been prescribed by this Court; and ought to be observ *M'Donald* vs. *Smalley et al.* 625.

CONCEALMENT.

Insurance, 15, 16.

CONSIGNMENT AND CONSIGNEES.

Bills of Lading, 1, 2.

CONSTRUCTION OF STATUTES.

1. It is a general rule, in the construction of public statutes, that t word "may," is to be construed "must," in all cases where the gislature mean to impose a positive and absolute duty, and not me ly to give a discretionary power. And in all cases, the constructi should be such as carries into effect the true intent and meaning the legislature in the enactment. *Minor et al.* vs. *The Mechan Bank of Alexandria.* 64.

CONSTRUCTION OF STATUTES.

2. The Mechanics Bank of Alexandria, 1, 2.
3. Jurisdiction, 1.
4. Lands and Land titles.
5. In the construction of the Registry Act of Ohio, the term "purchasers" is usually taken in its limited legal sense. It means a complete purchaser, or in other words, a purchaser clothed with a legal title. *Steele's Lessee* vs. *Spencer et al.* 559.
6. District of Columbia.
7. Construction of the Act of Congress, passed March 2d 1807, entitled "An Act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated. *Jackson* vs. *Clark et al.* 634.
8. The reservation made by the law of Virginia of 1783, ceding to Congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the river Scioto and Little Miami. It is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The residue of the lands are ceded to the United States, as a common fund for those states, who were, or might become members of the Union, to be disposed of for that purpose. *Ibid.* 635.
9. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust. *Ibid.* 635.
10. If the right existed in Congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows as a necessary consequence. *Ibid.* 635.
11. If it be conceded that the proviso in the Act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes, itself, a nullity. *Ibid.* 635.
12. Lands surveyed, are under the law as completely withdrawn from the common mass, as lands patented. It cannot be said that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys. They did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times. *Ibid.* 638.

CONTRACTS.

1. Chancery and Chancery practice. 11.
2. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties

CONTRACTS.

are always dependent, unless a contrary intimation clearly
The Bank of Columbia vs. *Hagner*. 464.

3. Although many nice distinctions are to be found in the books
question, whether the covenants or promises of the respe
ties to the contract, are to be considered independent or de
yet it is evident the intimation of Courts have strongly fav
latter construction, as being obviously the most just. *Ibi*

4. In such cases, if either vendor or vendee wish to compel the
fulfil his contract, he must make his part of the agreeme
dent, and cannot proceed against the other without actual
ance of the agreement on his part, or a tender and refus
465.

5. An averment of performance is always made in the declara
contracts, containing dependent undertakings, and that
must be supported by proof. *Ibid.* 465.

6. The time fixed for the performance of a contract, is, at law
the essence of the contract, and if the seller is not ready a
perform his part of the agreement on that day, the purc
elect to consider the contract at an end. But equity, whic
peculiar jurisdiction, is enabled to examine into the cause
in completing a purchase, and to ascertain how far the d
was deemed material by the parties, will, in certain cases,
agreement into execution, although the time appointed has
Ibid. 465.

7. It may be laid down as a rule, that, at law, to entitle the ven
cover the purchase money, he must aver in his declaration
ance of the contract on his part, or an offer to perform, at
specified for the performance. And this averment must b
ed by proof; unless the tender has been waived by the p
Ibid. 467.

8. If before the period fixed for the delivery of a deed for la
vendee has declared he would not receive it, and that he
to abandon the contract, it may render a tender of the de
the institution of a suit unnecessary. But this rule can nev
except in cases where the act which is construed into a w
curs *previous* to the time for performance. *Ibid.* 467.

9. The taking possession of property by the vendee, before con
is a circumstance from which is to be inferred that he consi
contract closed, but would not deprive him of the right to r
the property, if the vendor could not make a title, or neglec
so. After a relinquishment for such causes, the vendee c
tain an action to recover back the purchase money had it b
Ibid. 468.

10. Where the legal title cannot be conveyed to the vendee by t
or, and the vendee must resort to a Court of Equity to est
title, notwithstanding a conveyance of all the right of the
him, the Court will not compel him to pay the purchase mo
would be compelling him to take a law suit, instead of
Ibid. 468.

11. When no specific time for the payment of money is fixed
tract by which the same is to be paid by one party to the
judgment of law, the same is payable on demand. *Ibid.* 46

12. In an action upon a written contract, said to have been la
stroyed, and not for deceit and imposition, the plaintiff's ri
cover is measured principally by the contract; and the s

CONTRACTS.

evidence must prove it as laid in the declaration. The conversation which preceded the agreement, forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his understanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. *Tuyloe* vs. *Riggs*, 598.

13. When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations, ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in Court, who makes a claim which he cannot support. *Ibid.* 600.

14. When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon unknown and vague impressions, made by a conversation antecedent to the reduction of the agreement. *Ibid.* 600.

CORPORATION.

A subsequent Board of Directors of a bank, is to be considered as knowing all the circumstances communicated, or known to a previous Board. *The Mechanics Bank of Alexandria* vs. *Louisa and Maria Seton.* 309.

COURTS.

1. It is, doubtless, within the province of a Court, in the exercise of its discretion, to sum up the facts in the case to the jury; and submit them, with the inferences of law deducible therefrom, to the free judgment of the jury. But, care must be taken, in all such cases, to separate the law from the facts, and to leave the latter in unequivocal terms to the jury, as their true and peculiar province. *M'Lanahan* vs. *The Universal Insurance Company.* 182.

2. Little stress ought to be laid upon general expressions falling from Judges, in the course of trials. Where the facts are not disputed, the Judge often suggests, in a strong and pointed manner, his opinion as to their materiality and importance, and his leading opinion of the conclusion to which the facts ought to conduct the jury. This ought nôt to be deemed an intentional withdrawal of the facts, or the inferences deducible therefrom, from the cognizance of the jury, but rather as an expression of opinion addressed to the discretion of counsel, whether it would be worth while to proceed further in the cause. And the like expression in summing up any cause to the jury, must be understood by them merely as a strong exposition of the facts, not designed to overrule their verdict, but to assist them in forming it. And there is the less objection to this course in the English practice; because, if the summing up has had an undue influence, the mistake is put right by a new trial, upon an application to the discretion of the whole Court. This is so familiarly known, that it needs only to be stated, to be at once admitted. *Ibid.* 190.

COURTS.

3. Where the defendant had reserved a right to move the Court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the Court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The Court is not bound to do more than respond to the motion, in the terms in which it is made. Courts of justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. *Elliott et al.* vs. *Peirsol et al.* 338.

4. The construction of words belongs to the Court, and the materiality of an alteration in a deed, is a question of construction. *Steele's Lessee* vs. *Spencer et al.* 561.

5. Whether erasures and alterations in a deed are material or not, is a question of law to be decided by the Court. *Ibid.* 560.

6. A special verdict was found by the jury, upon which judgment was to be entered according as the opinion of the Court might be upon the construction of a certain deed, which deed was referred to, and made part of the special finding of the jury, but was not contained in the record thereof. A deed formed a part of a bill of exceptions taken to the opinion of the Court, upon a motion for a new trial; which bill of exceptions with the said deed, was contained in the record. The Court cannot judicially know that this is the same deed which is referred to in the verdict of the jury, or what are the other evidences of title connected with it. *M'Arthur* vs. *Porter's Lessee.* 626.

COURTS OF THE SEVERAL STATES.

1. If the Court of a state had jurisdiction of a matter, its decision would be conclusive; but this Court cannot yield assent to the proposition, that the jurisdiction of a state Court cannot be questioned, where its proceedings were brought, collaterally, before the Circuit Court of the United States. *Elliott et al.* vs. *Peirsol et al.* 340.

2. Where a Court has jurisdiction, it has a right to decide any question which occurs in the cause; and, whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification; and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers. *Ibid.* 340.

3. The jurisdiction of any Court, exercising authority over a subject, may be inquired into in every other Court, when the proceedings of the former are relied on, and brought before the latter by a party claiming the benefit of such proceedings. *Ibid.* 340.

4. The jurisdiction and authority of the Courts of Kentucky, are derived wholly from the statute law of the state. *Ibid.* 341.

5. The clerk of Woodford County Court, has no authority to alter the record of the acknowledgment of a deed, at any time after the record is made. *Ibid.* 341.

6. A decree of the Supreme Court of Ohio ordered that the patentee of a certain tract of land, should, within six months, make a deed, &c.

COURTS OF THE SEVERAL STATES.

with covenants of warranty conveying a portion of the land held under a patent to the complainants in that suit, and on the failure of A to make the said deed, &c. "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him." The decree of the Supreme Court of Ohio by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed as would have been vested by a deed of equal date; and the registry Act of Ohio applies as well to a title under such a decree, at it would do, if the party held under a *bona fide* deed of the same date with the patent of the land, and the decree gives a legal title as ample as a deed. *Steele's Lessee* vs. *Spencer et al.* 558.

7. It has been the uniform course of this Court, with respect to titles to real property, to apply the same rule that is applied by the state tribunals in like cases. *Waring* vs. *Jackson et al.* 571.
8. Where by the established practice of Courts in particular states, the Courts in actions of ejectment look beyond the grant, and examine the progressive stages of the title, from its incipient state until its consummation; such a practice will form the law of cases decided under the same in these states, and the Supreme Court of the United States, regard those rules of decision in cases brought up from such states, provided that in so doing, they do not suffer the provisions of any statute of the United States to be violated. *Ross* vs. *Barland et al.* 664.

COURTS OF THE UNITED STATES.

1. Jurisdiction.
2. Practice.
3. The course of prudence and duty in judicial proceedings in the United States Courts, when cases of difficult distribution as to power and right present themselves, is to yield rather than encroach. The duty is reciprocal, and will no doubt be met in the spirit of moderation and comity. In the conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur in which the maintenance of principles, and the administration of justice, according to its innate and inseparable attributes, may require a different course; and when such cases do occur, our Courts must do their duty; but until then, it is administering justice in the spirit of the Constitution, to conform as nearly as possible to the administration of justice in the Courts of the several states. *Fullerton et al.* vs. *The Bank of the United States.* 614.
4. Courts of the several states.

DEEDS.

1. Feme covert. 1.
2. If a deed has not been proved, acknowledged, and recorded, and would therefore be insufficient against subsequent purchasers, without notice; parties who claim under such deed, have a right to come into a Court of Equity, for a discovery, upon the ground of notice; and if notice should be brought home to subsequent purchasers, the complainants have a right to relief, by a decree quieting the title. *Findlay et al.* vs. *Hinde and Wife.* 245.
3. The privy examination and acknowledgment of a deed, by a *feme co-*

DEEDS.

vert, so as to pass her estate, cannot be legally proved by parol testimony. *Elliott et al.* vs. *Peirsol et al.* 338.

4. In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes, must be pursued. *Ibid.* 338.
5. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed. *Ibid.* 339.
6. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid. *Ibid.* 339.
7. It is the construction of the Act of 1810, that the clerks of the County Court of Kentucky, have authority to take acknowledgments and privy examinations of *femes coverts*, in all cases of deeds made by them and their husbands. *Ibid.* 339.
8. What the law requires to be done, and appear of record, can only be done, and made to appear by the record itself, or an exemplification of it. It is perfectly immaterial whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*. *Ibid.* 340.
9. A deed from *Baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a re-conveyance to the husband, and thus to vest in him the estate of the wife; was endorsed by the clerk of Woodford County Court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th 1816," and was certified as follows:—"Attest, J. M'Kenney, Jun. *Clerk*."
"*Woodford County, ss.* *September* 11*th* 1813.
"This deed from James Elliot, and Sarah G. Elliott his wife to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded. John M'Kenney, Jun. C. C. C."
Held, that subseqtient proceedings of the Court of Woodford County, by which the defects of the certificate of the clerk to state the privy examination of the *feme*, (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal,) were intended to be cured upon evidence that the privy examination was made by the clerk, will not supply the defect, or give validity to the deed. *Ibid.* 340.
10. Whether erasures and alterations in a deed are material or not, is a question for the Court. *Steele's Lessee* vs. *Spencer et al.* 560.
11. The provisions of the laws of Kentucky relative to the acknowledgment of deeds. *Elliot et al.* vs. *Peirsol et al.* 338.

DEPOSITIONS.

1. The authority given by the Act of Congress of 24th September 1789, chap. 20, to take depositions of witnesses, in the absence of the op-

DEPOSITIONS.

posite party, is in derogation of the rules of the common law, and has always been construed strictly; and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. *Bell* vs. *Morrison et al.* 355.

2. The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed. *Ibid.* 356.

3. It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted to supply any defects in the taking the deposition. *Ibid.* 356.

DEVISE.

1. The testator devised to his son Joseph Eden certain portions of his estate in New-York, among which were the premises sought to be recovered in this suit, to him, his heirs, executors and administrators for ever. In like manner he devised to his son Medcef, his heirs and assigns, certain other portions of his property; and adds the following clause: "It is my will and I do order and appoint, that if either of my said sons should depart this life without lawful issue, his share or part shall go to the survivor. And in case of both their deaths without lawful issue, I give all the property aforesaid to my brother John Eden, of Lofters, in Cleveland in Yorkshire, and my sister Hannah Johnson, of Whitby in Yorkshire, and their heirs." Medcef Eden died without issue, having devised his estate to his widow, and other devisees named in his will. According to the established law of New-York, nothing passed under the ulterior devise over to John Eden and Hannah Johnson; Medcef Eden on the death of his brother Joseph Eden became seised of an estate in fee simple absolute. *Waring* vs; *Jackson et al.* 571.

2. Adverse possession taken and held under a sheriff's sale, by virtue of judgments and executions against Joseph Eden, will not, according to the decisions of the Courts of New-York, prevent the operation of a devise by another, in whom the title to the estate was vested by the death of the defendant in the executions. *Ibid.* 571.

3. The testator, residing and owning real and personal estate in the county of Alexandria, District of Columbia, by his will gave "all his estate, real and personal, to his wife during her life, for the use and purpose of raising and educating his children," each child at the age of twenty-one to be entitled to an equal portion of his estate, real and personal; subject, each, to a deduction of one-third for the maintenance of his wife. He recommends his wife to sell the negroes for a term of years, and directs "an appraisement" only of "his estate" shall be made, that no sale of the furniture shall be made; and then states "that he is indebted to no one, and proposes to continue so," that he is surety for his brother, for which he holds a deed of trust on his property, sufficient, he hopes, to pay the same, and directs that his "estate shall not be sold to pay these debts, until the property so divided shall be sold," when his "estate must be charged with any deficiency, and directs that his executors shall not give security, as his own estate did not require it." This will does not charge the real estate of the testator with his debts. *Archer et al.* vs. *Deneale et al.* 588.

4. The word "estate" is sufficiently comprehensive to embrace property of every description, and will charge lands with debts, if used with

DEVISE.

other words which indicate an intention to charge them; but if used alone, without such intent, they will not have such operation. *Ibid.* 589.

DISTRICT OF COLUMBIA.

1. The Act of the legislature of Maryland, passed 19th December, 1791, entitled "An Act concerning the territory of Columbia, and the City of Washington," which, by the 6th section provides for the holding of lands by "foreigners," is an enabling act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen. *Spratt* vs. *Spratt.* 349.
2. A foreigner who becomes a citizen, is no longer a foreigner, within the view of the Act. Thus *after purchased lands*, vest in him as a citizen, not by virtue of the Act of the legislature of Maryland, but because of his acquiring the rights of citizenship. *Ibid.* 349.
3. Land in the county of Washington, and district of Columbia, purchased by a foreigner, before naturalization, was held by him under the law of Maryland, and might be transmitted to the relations of the purchasers, who were foreigners; and the capacity so to transmit those lands, is given absolutely, by this Act, and is not affected by his becoming a citizen; but passes to his heirs and relations, precisely as if he had remained a foreigner. *Ibid.* 349.
4. The Supreme Court of the United States has jurisdiction of appeals from the Orphans' Court, through the Circuit Court for the county of Washington, by virtue of the Act of Congress of February 13, 1801; and by the Act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of $ 1000 in order to entitle the party to an appeal. *Nicholls et al.* vs. *Hodges' Ex.* 565.

EQUITY.

1. It is a principle of equity, that, when an instrument is drawn and executed, which professes, or is intended, to carry into execution an agreement, whether in writing or by parol, previously entered into; but which, by mistake of the draftsman either in fact or in law, does not fulfil, or which violates the manifest intention of the parties to the agreement; equity will correct the mistake, so as to produce a conformity of the instrument to the agreement. *Hunt* vs. *Housmaniere's Adm.* 13.
2. The execution of instruments, fairly and legally entered into, is one of the peculiar branches of equity jurisdiction; and a Court of Equity will compel a delinquent party to perform his agreement, according to the terms of it, and to the manifest intention of the parties. *Ibid.* 13.
3. So, if the mistake exist, not in the instrument, which is intended to give effect to the agreement, but in the agreement itself, and is clearly proved to have been the result of ignorance of some material fact; a Court of Equity will, in general, grant relief, according to the nature of the particular case in which it is sought. *Ibid.* 13.
4. If an agreement was not founded on a mistake of any material fact, and if it was executed in strict conformity with itself, it would be unprecedented, for a Court of Equity to decree another security to be given, different from that which had been agreed upon; or to treat the case as if such other security had, in fact, been agreed upon and executed. *Ibid.* 14.

EQUITY.

5. Courts of Equity may compel parties to execute their agreements, but they have no power to make agreements for them. The death of one of the parties, and the consequent inefficiency of a security selected and intended to be valid and complete, but which was not so, will not give the right of interference. *Ibid.* 14.

6. A mistake arising from ignorance of law, is not a ground for reforming a deed founded on such mistake; except in some few cases, and those of peculiar characters. *Ibid.* 15.

7. If the obligee of a joint bond, by two or more, agree with one obligor to release him, and do so, and all the obligors are thereby discharged at law, equity will not afford relief against the legal consequences; although the release was given under a manifest misapprehension of the legal effect of it, in relation to the other obligors. *Ibid.* 16.

8. *It seems*, that there may be cases in which a Court of Equity will relieve against a plain mistake, arising from ignorance of law. But where parties upon deliberation and advice, reject one species of security, and agree to select another, under a misapprehension of the law as to the nature of the security thus selected; a Court of Equity will not, on the ground of misapprehension, and the insufficiency of the security, in consequence of a subsequent event not foreseen; direct a security, of a different character, to be given, or decree that to be done, which the parties suppose would have been effected by the instrument, which was finally agreed upon. The Court would be much less disposed to interfere in such a case, in favour of a particular creditor, against the general creditors of an insolvent estate. *Ibid.* 17.

9. Parol evidence, 1.

10. Where the vendee of real estate, had purchased it, subject to the dower of the widow—of which dower, he might have been informed if he had used proper diligence, a Court of Equity will not interfere, to release the vendee; but will leave him to such legal remedy, as he may be entitled to, in case his title should, at any future time, be disturbed. *Greenleaf* vs. *Queen et al.* 147.

11. Chancery Practice, 1, 2, 3.

12. A Court of Equity ought not to decree specific performance of a contract to the letter, where, from change of circumstances, mistake or misapprehension, it would be unconscientious so to do. The Court may so modify the agreement, as to do justice, as far as circumstances will permit; and refuse specific execution, unless the party seeking it, will comply with such modifications as justice requires. *The Mechanics Bank of Alexandria* vs. *Lynn.* 382.

13. If a bill charges a defendant with notice of a particular fact, an answer must be given without special interrogatory to the matter. But, a defendant is not bound to answer an interrogatory, not warranted by some matter contained in a former part of the bill. *Ibid.* 383.

14. When a judgment debtor comes into a Court asking protection on the ground that he has satisfied the judgment, the door is fully open for the Court to modify or grant the prayer, upon such conditions as justice demands. *Ibid.* 384.

15. In an appeal, under the testamentary law of Maryland, the Court being satisfied by an examination of the evidence contained in the record of the proceedings of the Orphans' Court of the county of Washington, relative to a claim made upon the estate of the testator by the executor, that the said evidence was too loose and indefinite

EQUITY.

to sanction the claim, disallowed the same; and reversed the decree of the Orphans' Court which allowed the claim. *Nicholls et al.* vs. *Hodges' Ex.* 566.

EVIDENCE.

1. When one party to an agreement, signed by the other contracting party, had delivered to such party a copy of the agreement in his own handwriting, but not signed by him, and from the nature of the instrument, it was to be fairly presumed, the original was in his custody; notice to produce the original paper, in order to give the copy in evidence, is not necessary. Such a copy, when offered to charge the party by whom the same was made, and who, by the tenor of the agreement, was to perform certain acts therein stated, may be considered not as a copy, but as an original, in relation to the obligations of the party giving the copy, and be so given in evidence. *Carroll* vs. *Peake*, 22.
2. Where letters, a part of the evidence in the Court below, have become lost or mislaid, every thing is to be presumed to have been contained in them, to support the opinion of the Court, in relation to their contents; and the party who denies that the letters authorized the decision of the Court upon them, must show, by evidence, their contents. *Ibid.* 22.
3. If, in any case, in which testimony was offered by a plaintiff, the Court ought to instruct the jury that he had no right to recover, such instruction certainly ought not to be granted, if any possible construction of the testimony would support the action. *The Bank of Washington* vs. *Triplett & Neale*, 31.
4. The cross examination of a witness by the opposite party, is considered as a waiver of exceptions to the regularity of his deposition. *The Mechanics Bank of Alexandria* vs. *Maria and Louisa Seton*, 307.
5. By the rules of this Court, "in all cases of equity and admiralty jurisdiction, no objection shall be allowed to be taken to the admissibility of any deposition, deed, grant, or other exhibit, found in the record, as evidence; unless objection was taken thereto in the Court below; but the same shall otherwise be deemed to have been taken by consent." *Ibid.* 307.
6. Where the general agent of parties carrying on business in a tan-yard, instead of a journal of hides received for the parties from day to day, gave, at considerable intervals, certificates of the total amount of hides received from the last preceding settlement, up to the periods when the certificates bore date; such certificates are equally binding, as certificates detailing the separate transactions of each day; and may be read in evidence to charge the parties, whose agent the person giving the certificates was. *Barry* vs. *Foyles*, 316.
7. Where the suit is brought upon a partnership transaction, against one of the partners, and the declaration stated a contract with the partner who is sued, and gave no notice that it was made by him with another person, evidence of a joint assumpsit may be given to support such a declaration; and the want of notice, has never been considered as justifying an exception to such evidence at the trial. *Ibid.* 317.
8. Depositions how taken under the provisions of the Act of Congress of 24th September. *Bell* vs. *Morrison*, 355.
9. The authority given by the Act of Congress of 24th September 1789, chap. 20, to take depositions of witnesses, in the absence of the op-

posite party, is in derogation of the rules of the Common Law, and has always been construed strictly: and, therefore, it is necessary to establish, that all the requisites of the law have been complied with, before such testimony is admissible. *Ibid.* 355.

10. The certificate of the magistrate taking the deposition, is good evidence of the facts stated therein, so as to entitle the deposition to be read to the jury; if all the necessary facts are there sufficiently disclosed. *Ibid.* 356.
11. It should plainly appear, from the certificate of the magistrate, that all the requisites of the statute have been fully complied with; and no presumption will be admitted to supply any defects in the taking the deposition. *Ibid.* 356.
12. A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter, had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, in a question of pedigree. *Elliott* vs. *Peirsol*, 337.
13. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted. *Ibid.* 337.
14. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter written about the time, stating the pedigree of the claimants, was not considered as excluded, by the rule of law which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence. *Ibid.* 337.
15. Where the defendant had reserved a right to move the Court to exclude any part of the plaintiff's evidence, which he might choose to designate as incompetent, and it did not appear, from the bill of exceptions, that he designated any particular piece or part of the evidence as objectionable, and moved the Court to exclude the whole, or to instruct the jury that it was insufficient to prove title in the lessors of the plaintiff; this could not be done on the ground of incompetency, unless the whole was incompetent. The Court is not bound to do more than respond to the motion, in the terms in which it is made. Courts of Justice are not obliged to modify the propositions submitted by counsel, so as to make them fit the case. If they do not fit, that is enough to authorize their rejection. *Ibid.* 338.
16. A joint and several bond, where it was not understood to be offered as general evidence as to all the parties to it, but only as to one of the obligors, and was connected with a title derived from that obligor; was properly permitted to go to the jury, upon proof of the execution of the bond by that obligor alone; as, under the circumstances, it was *prima facie* evidence of his execution of the instrument. *Conard* vs. *The Atlantic Insurance Company*, 451.
17. Under the law of the state of Kentucky, and the decisions of their Courts, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Davis* vs. *Mason*, 508.
18. It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it. *Ibid.* 509.

EVIDENCE.

19. The rule of law is, that the best evidence must be given, of which the nature of the thing is capable; that is, that no evidence shall be received, which pre-supposes greater evidence behind in the party's possession or power. The withholding of that better evidence raises a presumption, that, if produced, it might not operate in favour of the party who is called upon for it. For this reason, a party who is in possession of an original paper, is not permitted to give a copy in evidence or to prove its contents. *Tayloe* vs. *Riggs*. 596.

20. The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might be completely deprived of his rights, at least in a Court of Law. *Ibid.* 596.

21. It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received. *Ibid.* 596.

22. The testimony which establishes the loss of a paper, is addressed to the Court, and does not relate to the contents of the paper. It is a fact which may be important as letting the party in to prove the justice of the cause, but does not itself prove any thing in the cause. *Ibid.* 597.

23. In an action upon a written contract, said to have been lost or destroyed, and not for deceit and imposition, the plaintiff's right to recover is measured principally by the contract; and the secondary evidence must prove it as laid in the declaration. The conversation which preceded the agreement forms no part of it, nor are the propositions or representations which were made at the time, but not introduced into the written contract, to be taken into view in construing the instrument itself. Had the written paper stated to be lost or mislaid, been produced, neither party could have been permitted to show the party's inducements to make it, or to substitute his anderstanding for the agreement itself. If he was drawn into it by misrepresentation, that circumstance might furnish him with a different action, but cannot affect this. *Ibid.* 598.

24. When a written contract is to be proved, not by itself but by parol testimony, no vague uncertain recollection concerning its stipulations ought to supply the place of the written instrument itself. The substance of the agreement ought to be proved satisfactorily; and if that cannot be done, the party is in the condition of every other suitor in Court, who makes a claim which he cannot support. *Ibid.* 600.

25. When parties reduce their contracts to writing, the obligations and rights of each are described by the instrument itself. The safety which is expected from them would be much impaired, if they could be established upon uncertain and vague impressions, made by a

EVIDENCE.

conversation antecedent to the reduction of the agreement. *Ibid.* 600.

EXECUTION.

Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds, for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after *ten days' notice* to the obligors in the bond of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bond; if the notice given to the obligees, of the plaintiff's intention to proceed, is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution, may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favoured. *Alexander et al.* vs. *Brown.* 684.

EXECUTORS AND ADMINISTRATORS.

1. The Orphans' Court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the Court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory. *Nicholls et al.* vs. *Hodges' Ex.* 565.
2. If the executor has a claim on the estate of the deceased, it shall stand on an equal footing with other claims of the same nature. *Ibid.* 565.
3. On a plenary proceeding, if either party shall require it, the Court will direct an issue or issues to be made up, and sent to a Court of Law to be tried; and any person conceiving himself aggrieved by any judgment, decree, decision or order, may appeal to the Court of Chancery, or to a Court of Law; and in Maryland, the decision of the Court to which the appeal is made is final. *Ibid.* 565.
4. The Court being satisfied by an examination of the evidence contained in the record of the proceedings of the Orphans' Court of the county of Washington, relative to a claim made upon the estate of the testator by the executor, that the said evidence was too loose and indefinite to sanction the claim, disallowed the same; and reversed the decree of the Orphans' Court which allowed the claim. *Ibid.* 566.
5. The commission to be allowed to the executor or administrator is submitted by law to the discretion of the Court, upon a consideration of all the circumstances, and it was obviously the intention of the legislature, that the decision of the Orphans' Court should be final and conclusive. *Ibid.* 565.

FEME COVERT.

1. Feme sole trader.
2. By the law of Maryland, a married woman cannot dispose of real property, without the consent of her husband; nor can she execute a good and valid deed to pass real estate, unless he shall join in it. The separate examination and other solemnities required by law are

FEME COVERT.

indispensable, and must not be omitted. A deed, therefore, executed by a married woman, of real property, acquired by her while a *feme sole* trader, while she was abandoned by her husband, is void. *Rhea et al.* vs. *Rhenner*. 109.

3. The privy examination and acknowledgment of a deed, by a *feme covert*, so as to pass her estate, cannot be legally proved by parol testimony. *Elliott et al.* vs. *Peirsol et al.* 338.
4. In Virginia and Kentucky, the modes of conveyance by fine and common recovery, have never been in common use; and in these states, the capacity of a *feme covert* to convey her estate by deed, is the creature of the statute law; and to make her deed effectual, the forms and solemnities prescribed by the statutes, must be pursued. *Ibid.* 338.
5. By the Virginia statute of 1748, "when any deed has been acknowledged by a *feme covert*, and no record made of her privy examination, such deed is not binding upon the *feme* and her heirs." This law was adopted by Kentucky, at her separation from Virginia; and is understood never to have been repealed. *Ibid.* 339.
6. The provisions of the laws of Kentucky, relative to the privy examination of a *feme covert*, in order to make a conveyance of her estate valid. *Ibid.* 339.
7. It is the construction of the Act of 1810, that the clerks of the County Court of Kentucky, have authority to take acknowledgments and privy examinations of *femes coverts*, in all cases of deeds made by them and their husbands. *Ibid.* 339.
8. What the law requires to be done, and appear of record, can only be done, and made to appear by the record itself, or an exemplification of it. It is perfectly immaterial, whether there be an acknowledgment or privy examination in form, or not, if there be no record made of the privy examination; for, by the express provisions of the law, it is not the fact of privy examination only, but the recording of the fact, which makes the deed effectual to pass the estate of a *feme covert*. *Ibid.* 340.
9. A deed from *Baron* and *feme*, of lands in the state of Kentucky, executed to a third person, by which the land of the *feme* was intended to be conveyed for the purpose of a re-conveyance to the husband, and thus to vest in him the estate of the wife, was endorsed by the clerk of Woodford County Court, "acknowledged by James Elliott, and Sarah G. Elliott, September 11th, 1816," and was certified as follows:—"Attest, J. M'Kenney, Jun. *Clerk*."
"*Woodford County, ss.* *September 11th*, 1813.
"This deed from James Elliott, and Sarah G. Elliott his wife, to Benjamin Elliott, was this day produced before me, and acknowledged by said James and Sarah to be their act and deed, and the same is duly recorded. John M'Kenney, Jun. C. C. C."
Held, that subsequent proceedings of the Court of Woodford county, by which the defects of the certificate of the clerk to state the privy examination of the *feme*, (which, by the laws of Kentucky, is necessary to make a conveyance of the estate of a *feme covert* legal,) were intended to be cured upon evidence that the privy examination was made by the clerk, will not supply the defect, or give validity to the deed. *Ibid.* 340.

FEME SOLE TRADERS.

The law seems to be settled, that when the wife is left by the husband,

FEME SOLE TRADERS.

without maintenance and support, has traded as a *feme sole*, and has obtained credit as such, she ought to be liable for her debts; and the law is the same, whether the husband is banished for his crimes, or has voluntarily abandoned the wife. *Rhea et al.* vs. *Rhenner*. 108.

FLORIDA.

1. The treaty with Spain, by which Florida was ceded to the United States, is the law of the land, and admits the inhabitants of Florida to the enjoyment of the privileges, rights, and immunities of the citizens of the United States. They do not however participate in political power; they do not share in the government, until Florida shall become a state. In the mean time Florida continues to be a territory of the United States, governed by virtue of that clause in the Constitution, which empowers "Congress to make all needful rules and regulations, respecting the territory, or other property belonging to the United States." *The American Insurance Company* vs. 356 *Bales of Cotton*. 542.
2. The powers of the territorial legislature of Florida, extend to all rightful objects of legislation; subject to the restriction, that their laws shall not be "inconsistent with the laws and Constitution of the United States." *Ibid.* 543.
3. All the laws which were in force in Florida, while a province of Spain, those excepted which were political in their character, which concerned the relations between the people and their sovereign, remained in force until altered by the government of the United States. Congress recognises this principle, by using the words "laws of the territory now in force therein." No laws could, then, have been in force but those enacted by the Spanish government. If among them there existed a law on the subject of salvage, and it is scarcely possible there should not have been such a law, jurisdiction over it, was conferred by the Act of Congress relative to the territory of Florida, on the Superior Court; but that juridiction was not exclusive. A territorial Act, conferring jurisdiction over the same cases as an inferior Court, would not have been inconsistent with the seventh section of the Act, vesting the whole judicial power of the territory in two Superior Courts, and in such inferior Courts, and Justices of the Peace, as the legislative council of the territory may from time to time establish." *Ibid.* 544.
4. The Judges of the Superior Courts of Florida hold their offices for four years. These Courts, then, are not Constitutional Courts, in which the judicial powers conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative Courts, created in virtue of the general right of sovereignty, which exists in the government; or in virtue of that clause which enables Congress to make laws regulating the territories belonging to the United States. The jurisdiction with which they are invested, is not a part of that judicial power, which is defined in the third article of the Constitution, but is conferred by Congress in the exercise of its powers over the territories of the United States. *Ibid.* 546.
5. Although admiralty jurisdiction can be exercised in the states, in those Courts only which are established in pursuance of the third article of the Constitution, the same limitation does not extend to the territories. In legislating for them, Congress exercises the combined powers of the general and state governments. *Ibid.* 546.

FLORIDA.

6. The Act of the territorial legislature of Florida, erecting a Court which proceeded under the provisions of the law to decree, for salvage, the sale of a cargo of a vessel which had been stranded, and which cargo had been brought within the territorial limits, is not inconsistent with the laws and Constitution of the United States, and is valid; and consequently a sale of the property made in pursuance of it changed the property. *Ibid.* 546.

FLORIDA TREATY.

1. The object of the treaty with Spain, which ceded Florida to the United States, dated 22d May 1819, was to invest the commissioners with full power and authority to receive, examine, and decide upon the *amount* and *validity* of asserted claims upon Spain, for damages and injuries. Their decision, within the scope of this authority, is conclusive and final, and is not re-examinable. The parties must abide by it, as the decree of a competent tribunal of exclusive jurisdiction. A rejected claim cannot be brought again under review, in any judicial tribunal. But it does not naturally follow that this authority extends to adjust all conflicting rights, of different citizens, to the fund so awarded. The commissioners are to look to the original claim for damages and injuries against Spain itself; and it is wholly immaterial, who is the legal or equitable owner of the claim, provided he is an American citizen. *Comegys et al.* vs. *Vasse.* 212.
2. After the validity and amount of the claim has been ascertained by the award of the commissioners, the rights of the claimant to the fund, which has passed into his hands and those of others, are left to the ordinary course of judicial proceedings, in the established Courts of Justice. *Ibid.* 212.
3. The treaty with Spain recognised an existing right in the aggrieved parties to compensation; and did not, in the most remote degree, turn upon the notion of donation or gratuity. It was demanded by our government as matter of right, and as such was granted by Spain. *Ibid.* 217.
4. Bankrupt and Bankruptcy, 1.

FORFEITURE.

A Court of Chancery, is not the proper tribunal to enforce a forfeiture; the remedy for the same being at law. *Horsburg* vs. *Baker et al.* 236.

FRAUD.

1. Without undertaking to suggest, whether in any case the want of possession of the thing sold constitutes, *per se*, a badge of fraud, or is only, *prima facie*, a presumption of fraud; it is sufficient to say, that in case even of an absolute sale of personal property, the want of such possession is not presumption of fraud, if possession cannot, from the circumstances of the property, be within the power of the parties. *Conard* vs. *The Atlantic Insurance Company.* 449.
2. In cases where the sale is not absolute but conditional, the want of possession, if consistent with the stipulations of the parties, and *a fortiori*, if flowing directly from them, has never been held to be, *per se*, a badge of fraud. *Ibid.* 449.

FRAUDS.

See Statute of.

INSOLVENCY.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, chap. 128, sec. 65. *Conard* vs. *The Atlantic Insurance Company*. 438.
2. It is obvious, that the latter clause of the 65th section of the Act of 1799, is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative in the former part of the enactment. *Ibid.* 439.
3. Insolvency, in the sense of the statute, relates to such a general divestment of property, as would in fact be equivalent to insolvency in its technical sense. It supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *vs.* Hooe, 3 *Cranch*, 73; and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute. *Ibid.* 439.
4. Mere inability of the debtor to pay all his debts, is not an insolvency within the statute; but, it must be manifested in one of the three modes, pointed out in the explanatory clause of the section. *Ibid.* 439.

INSURABLE INTEREST.

The master of a vessel, to whom property shipped on board of a vessel under his command is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy. *Buck & Hedrick* vs. *The Chesapeake Insurance Company*. 163.

INSURANCE.

1. To affirm, that "in policies for whom it may concern," there *can* be no undue concealment as to the parties interested in the property to be insured," is obviously going much too far; since the underwriter has an unquestionable right to be informed, *if he makes the inquiry*. The assured may be silent, it is true, if he will; and let the premium be charged accordingly; but if the inquiry, when made, should be responded to by information contrary to the verity of the case, this obviously gives a conventional signification to the terms of the policy, which may differ from the known and received signification in ordinary cases. *Buck & Hedrick* vs. *The Chesapeake Insurance Company*. 159.
2. A policy "for whom it may concern," will, in ordinary cases, cover belligerent property. *Ibid.* 160.
3. A knowledge of the state of the world—of the allegiance of particular countries—of the risks and embarrassments affecting their commerce —of the course and incidents of the trade on which they insure, and of the established import of the terms used in their contracts, must necessarily be imputed to underwriters. *Ibid.* 160.
4. The term *interest*, as used in application to the right to insure, does not necessarily imply *property*, in the subject of insurance. *Ibid.* 163.
5. The master of a vessel, to whom property shipped on board the vessel under his command is to be consigned, in the absence of proof that the owner of the property had not given authority to order insurance, has an insurable interest in the property on board his vessel; and this interest is sufficient to authorize the recovery of a loss on the policy. *Ibid.* 163.

INSURANCE.

6. As to the effect of certain instructions in a letter relative to insurance, and circumstances connected with the same, constituting a representation to vitiate a policy, made under the authority and directions of the letter. *Ibid.* 163.
7. Every ship must, at the commencement of the voyage insured, possess all the qualities of seaworthiness, and be navigated by a competent master and crew. *M'Lanahan* vs. *The Universal Insurance Company.* 183.
8. Seaworthiness in port, or while lying in the offing, may be one thing; and seaworthiness for the whole voyage, quite another. *Ibid.* 184.
9. A policy on a ship, "at and from a port," will attach; although the ship be, at the time, undergoing extensive repairs, in port—so as, in a general sense, for the purposes of the whole voyage, to be utterly unseaworthy. *Ibid.* 184.
10. What is a competent crew for the voyage—At what time such crew should be on board—What is proper pilot ground—What is the course and usage of trade, in relation to the master and crew being on board, when the ship breaks ground, for the voyage—are questions of fact dependent upon nautical testimony, and exclusively within the province of the jury. *Ibid.* 184.
11. The contract of insurance, is one of mutual good faith; and the principles which govern it, are those of an enlightened moral policy. The underwriter must be presumed to act upon the belief, that the party procuring insurance, is not, at the time, in possession of any fact material to the risk, which he does not disclose; and that no known loss had occurred, which, by reasonable diligence, might have been communicated to him. *Ibid.* 185.
12. If a party knowing that his agent is about to procure insurance for him, withholds information, for the purpose of misleading the underwriter; it is a fraud, and vitiates the insurance. *Ibid.* 185.
13. Where a party orders insurance, and afterwards receives intelligence material to the risk, or has knowledge of a loss, he ought to communicate it to the agent, by due and reasonable diligence, to be judged under all the circumstances of each particular case, if it can be communicated; for the purpose of countermanding the order, or laying the circumstances before the underwriter. *Ibid.* 185.
14. What constitutes due and reasonable diligence, is a question of fact for the jury. *Ibid.* 186.
15. The accidental concealment of the time of the sailing of a vessel, would not prejudice the insurance, unless material to the risk; if fraudulently intended, it might not mislead; and whether fraudulent or not, is matter of fact for the jury. *Ibid.* 188.
16. The material ingredients of a question of the *importance* of concealing the time of a vessel's sailing, are mixed up of nautical skill, information, and experience; and are, in no sense, judicially cognizable, as matters of law. It seems, that this question does not cease to be a question of fact, when the vessel is to sail from a port abroad. *Ibid.* 188.
17. The question of the materiality of the time of the sailing of the ship to the risk, is a question for the jury, under the direction of the Court, as in other cases. The Court may aid the judgment of the jury, by an exposition of the nature, bearing, and pressure of the facts; but it has no right to supersede the exercise of that judgment, and to direct an absolute verdict as upon contested matters of fact, resolving itself into a mere point of law. *Ibid.* 191.

JUDGMENTS.

Under the laws of Virginia, a confession of judgment by the defendant, is a release of errors. *Mandeville* vs. *Suckley et al.* 136.

JURISDICTION.

1. In the construction of the 25th section of the Judicial Act, passed 24th of September 1789, this Court has never required, that the treaty, or Act of Congress, under which the party claims, who brings the final judgment of a state Court into review before this Court, should have been spread upon the record. It has always deemed it essential to the exercise of jurisdiction, in such a case, that the record should show a complete title, under the treaty, or Act of Congress, and that the judgment of the Court is in violation of that treaty or Act. *Hickie* vs. *Starke et al.* 98.

2. In the District Court of the United States, for the district of Georgia, a libel was filed claiming certain Africans, as the property of the libellant, which had been brought into the state of Georgia, and were seized by the authority of the governor of the state, for an alleged illegal importation; process was issued against the slaves, but was not served. The case was taken by appeal to the Circuit Court, and the governor of Georgia filed a paper, in the nature of a stipulation, importing to hold the Africans subject to the decree of the Circuit Court, &c. Held that such a stipulation could not give jurisdiction in the case to the Circuit Court; as process could not issue legally from the Circuit Court against the Africans, because it would be the exercise of original jurisdiction in admiralty, which the Circuit Court does not possess. *The Governor of Georgia* vs. *Juan Madrazo.* 121.

3. "It may be laid down as a rule, which admits of no exception, that in all cases where jurisdiction depends on the party, it is the party named in the record." *Ibid.* 122.

4. The libel and claim exhibited a demand for money actually in the treasury of the state of Georgia, mixed up with the general funds of the state, and for slaves in the possession of the government; the possession of both of which was acquired by means which it was lawful in the state to exercise. Held that the Courts of the United States had no jurisdiction; the same being taken away by the 11th article of the amendments to the Constitution of the United States. *Ibid.* 123.

5. In a case where the chief magistrate of a state is sued, not by his name, but by his style of office, and the claim made upon him is entirely in his official character, the state itself may be considered a party in the record. *Ibid.* 124.

6. The complainants are stated, in the bill, to be citizens of the state of South Carolina. The defendant, the Bank of Georgia, is a body corporate, existing under an Act of the legislature; but the citizenship of the individual corporators is not stated. The averment, in the original bill, is, that William B. Bullock and Samuel Hale are citizens of Georgia, and residents therein; William B. Bullock is afterwards designated in the bill, as "President of the Mother Bank, and Samuel Hale, as the President of the Branch Bank at Augusta, in the state of Georgia." The Courts of the United States have no jurisdiction of the case. The record does not show that the defendants were citizens of Georgia, nor are there any distinct allegations that the stockholders of the bank, were citizens of that state. *Breithaupt et al.* vs. *The Bank of Georgia et al.* 238.

JURISDICTION.

7. The Court will not take jurisdiction of a case, where, although the whole property claimed by the lessor of the plaintiff in error under a patent, and which was recovered in ejectment, exceeded two thousand dollars, the title to a lot of ground, part of the whole tract, which was of less value than five hundred dollars, was only involved in the case before the Court. *Old Grant on the demise of Meredith* vs. *M'Kee et al.* 248.

8. If the Court of a state had jurisdiction of a matter, its decision would be conclusive; but this Court cannot yield assent to the proposition, that the jurisdiction of a state Court cannot be questioned, where its proceedings were brought, collaterally, before the Circuit Court of the United States. *Elliott* vs. *Peirsol*, 340.

9. Where a Court has jurisdiction, it has a right to decide any question which occurs in the cause; and whether its decision be correct, or otherwise, its judgments, until reversed, are regarded as binding in every other Court. But if it act without authority, its judgments and orders are regarded as nullities. They are not voidable, but simply void; and form no bar to a remedy sought in opposition to them, even prior to a reversal. They constitute no justification; and all persons concerned in executing such judgments, or sentences, are considered, in law, as trespassers. *Ibid.* 340.

10. The jurisdiction of any Court, exercising authority over a subject, may be inquired into in every other Court, when the proceedings of the former are relied on, and brought before the latter, by a party claiming the benefit of such proceedings. *Ibid.* 340.

11. The jurisdiction and authority of the Courts of Kentucky, are derived wholly from the statute law of the state. *Ibid.* 341.

12. The clerk of Woodford County Court, has no authority to alter the record of the acknowledgment of a deed, at any time after the record is made. *Ibid.* 341.

13. The Constitution and laws of the United States give jurisdiction to the District Courts, over all cases in admiralty; but jurisdiction over the case, does not constitute the case itself. *The American Insurance Company* vs. 356 *Bales of Cotton.* 545.

14. The Constitution declares that "the judicial power shall extend to all cases in law and equity arising under it—the laws of the United States, and treaties made, or which shall be made under their authority;—to all cases affecting ambassadors, or other public ministers and consuls; to all cases of admiralty and maritime jurisdiction." The Constitution certainly contemplates these as three *distinct classes of cases;* and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the other two. The discrimination made between them is conclusive against their identity. *Ibid.* 545.

15. A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. Such cases are as old as navigation itself; and the law admiralty and maritime, as it existed for ages, is applied by our Courts to the cases as they arise. It is not then to the eighth section of the territorial Act, that we are to look for the grant of admiralty and maritime jurisdiction in the territorial Courts of Florida. Consequently, if that jurisdiction is exclusive, it is not made so by the reference in the Act of Congress, to the District Court of Kentucky. *Ibid.* 545.

16. The Supreme Court of the United States has jurisdiction of appeals from the Orphans' Court, through the Circuit Court for the county of

JURISDICTION.

Washington, by virtue of the Act of Congress of February 13th, 1801; and by the Act of Congress subsequently passed, the matter in dispute, exclusive of costs, must exceed the value of 1000 dollars in order to entitle the party to an appeal. *Nicholls et al.* vs. *Hodges' Executors.* 565.

17. It cannot be alleged, that a citizen of one state, having title to lands in another state, is disabled from suing for those lands in the Courts of the United States, by the fact that he derives his title from a citizen of the state in which the lands lie. *M'Donald* vs. *Smalley et al.* 623.

18. M., a citizen of Ohio, apprehensive his title to lands in that state could not be maintained in the state Court, and being indebted to the plaintiff, a citizen of Alabama, to the amount of 1100 dollars, offered to sell and convey to him the land, in payment of the debt, stating in the letter by which the offer was made, that the title would most probably be maintained in the Courts of the United States, but would fail in the Courts of the state. The property was estimated at more than the debt, but in consequence of the difficulties attending the title, he was willing to convey it for the debt, which was done. The plaintiff in error, after the land was conveyed to him, gave his bond to make a quit claim title to the land, on condition of receiving 1000 dollars; held that the title acquired by the purchaser, gave jurisdiction to the Courts of the United States. *Ibid.* 623.

19. The motives which induced M. to make the contract for the purchase of the land, can have no influence on its validity. A Court cannot enter into the consideration of those motives, when deciding on its jurisdiction. *Ibid.* 624.

20. In a contract between a mortgagor and mortgagee, being citizens of different states, it cannot be doubted, that an ejectment, or bill to foreclose, may be brought in a Court of the United States, by the mortgagee residing in a different state. *Ibid.* 624.

21. Both the plaintiff and defendants claimed title under the provisions of the Act of Congress, passed 3d March 1803, entitled "An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee;" and the decision of the Supreme Court of the state of Mississippi, was, upon the construction given to that Act, by the commissioners acting under its authority. This is a case which draws into question the construction of an Act of Congress, and the Supreme Court of the United States has jurisdiction on a writ of error, by which the decision of the Court of the state of Mississippi is brought up for revision, under the 25th section of the Judiciary Act of 1789. *Ross* vs. *Barland et al.* 655.

LACHES.

1. Official bonds, 4.
2. Dox *vs.* The Postmaster-General, 318.

LANDS AND LAND TITLES.

1. In order to bring himself within the protection of the Act of cession by the state of Georgia to the United States, the party must show that he was "actually settled" on the land, on the 27th of October 1795, the period mentioned in the said Act of cession. *Hickie* vs. *Starke et al.* 98.

LANDS AND LAND TITLES.

2. It seems, that a settlement made on the land by another person, who cultivated it for the proprietor, would be sufficient to constitute "an actual settlement," within the meaning of the law; though the proprietor should not reside, in person, on the estate, or within the territory. *Ibid.* 98.

3. Construction of the Act of Congress passed March 2d 1807, entitled "An Act to extend the time for locating Virginia military warrants, for returning surveys thereon to the office of the Secretary of the Department of War, and appropriating lands for the use of schools, in the Virginia military reservation, in lieu of those heretofore appropriated. *Jackson* vs. *Clark et al.* 634.

4. The reservation made by the law of Virginia of 1783, ceding to Congress the territory north-west of the river Ohio, is not a reservation of the whole tract of country between the rivers Scioto and Little Miami. It is a reservation of only so much of it, as may be necessary to make up the deficiency of good lands in the country set apart for the officers and soldiers of the Virginia line, on the continental establishment, on the south-east side of the Ohio. The residue of the lands are ceded to the United States, as a common fund for those states, who were, or might become members of the Union, to be disposed of for that purpose. *Ibid.* 635.

5. Although the military rights constituted the primary claim upon the trust, that claim was, according to the intention of the parties, so to be satisfied as still to keep in view the interests of the Union, which were also a vital object of the trust. This was only to be effected, by prescribing the time in which the lands to be appropriated by these claimants, should be separated from the general mass, so as to enable the government to apply the residue to the general purposes of the trust. *Ibid.* 635.

6. If the right existed in Congress to prescribe a time within which military warrants should be located, the right to annex conditions to its extension, follows as a necessary consequence. *Ibid.* 635.

7. If it be conceded that the proviso in the Act of 2d March 1807, was not intended for the protection of surveys which were in themselves absolutely void; it must be admitted that it was intended to protect those which were defective, and which might be avoided for irregularity. If this effect be denied to the proviso, it becomes, itself, a nullity. *Ibid.* 635.

8. Lands surveyed, are under the law as completely withdrawn from the common mass, as lands patented. It cannot be said that the prohibition, that "no location shall be made on tracts of land for which patents had previously been issued, or which had been previously surveyed," was intended only for valid and regular surveys. They did not require legislative aid. The clause was introduced for the protection of defective entries and surveys, which might be defeated by entries made in quiet times. *Ibid.* 638.

9. Under the Act of Congress of March 3d, 1803, entitled "An Act regulating the grants of land, and providing for the disposal of the lands of the United States, south of the state of Tennessee," such lands only were authorized to be offered for sale, as had not been appropriated by the previous sections of the law, and certificates granted by the commissioners in pursuance thereof. A right therefore, to a particular tract of land derived from a donation certificate given under that law, is superior to the title of any one who purchased the same land at the public sales, unless there is

LANDS AND LAND TITLES.

some fatal infirmity in the certificate, which renders it void. *Ross* vs. *Barland et al.* 666.

10. The Act of Congress requires no precise form for the donation certificate. It is sufficient if the proofs be exhibited to the Court of commissioners, to satisfy them of the facts entitling the party to the certificate. It is sufficient if the consideration, to wit the occupancy, and the quantity granted, appears. Nothing more is necessary to certify to the government the party's right, or to enable him, after it is surveyed by the proper officer, to obtain a patent. *Ibid.* 666.
11. The second section of the Act of Congress of March 3, 1803, was intended to confer a bounty on a numerous class of individuals, and in construing the ambiguous words of the section, it is the duty of the Court to adopt that construction which will best effect the liberal intentions of the legislature. *Ibid.* 667.
12. The time when the territory over which this law operated was evacuated by the Spanish troops, was very important; as the law was intended to provide for those who were actually at that time inhabitants of, and cultivated the soil within it; but whether it was in 1797, or 1798, was comparatively unimportant. The decision of the commissioners upon the period when the evacuation took place, is sufficient; and the Court are disposed to adopt the construction of the Act, given by the commissioners west of Pearl river: that the evacuation took place on the 30th March, 1798, by which persons coming within the objects of the section, were entitled to donation certificates. *Ibid.* 667.
13. Congress have treated as erroneous, the construction given to the law by the commissioners to settle claims to lands east of Pearl river, who have decided, that only those who were settled on the lands within the territory in the year 1797, were entitled to donation certificates, and who had granted to others pre-emption certificates. *Ibid.* 668.
14. The commissioners appointed under the Act of Congress relative to claims to lands of the United States south of the state of Tennessee, were authorized to hear evidence as to the time of the actual evacuation of the territory by the Spanish troops; and to decide upon the fact. The law gave them power to hear and decide all matters respecting such claims, and to determine thereon, according to justice and equity; and declared their deliberations shall be final. The Court are bound to presume that every fact necessary to warrant the certificate, in the terms of it, was proved before the commissioners; and that consequently, it was shown to them, that the final evacuation of the territory by the Spanish troops, took place on the 30th of March, 1798. *Ibid.* 668.

LENGTH OF TIME.

See Statute of Limitations.

LIEN.

1. Priority of the United States.
2. Mortgages may as well be given to secure future advances, and contingent debts, as those which are certain and due. The only question that properly arises in such cases, is the *bona fides* of the transaction. *Conard* vs. *The Atlantic Insurance Company.* 448.
3. The case of Thellusson vs. Smith, 2 *Wheat.* 396, turned upon its own particular circumstances. And it establishes no such proposition, as

LIEN.

that a specific and perfected lien can be displaced by the mere priority of the United States. *Ibid.* 444.

4. It is not understood, that a general lien, by judgment on lands, constitutes *per se* a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out immediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. *Ibid.* 443.

LIMITATION.

See Statute of Limitations.

MANDAMUS.

The Court refused to issue a *mandamus* to the Circuit Court for the county of Washington, commanding that Court to strike off a plea which the Court had permitted the defendant to put in, and to compel the defendant to enter another plea, which the plaintiffs' counsel deemed the proper plea, under the provisions of an Act of the legislature of Maryland, upon which the proceedings were founded, incorporating the Bank of Columbia. *Bank of Columbia* vs. *Sweeny*, 567.

MARRIAGE.

By the laws of Maryland, a *feme covert*, who has been abandoned by her husband, is not permitted to marry a second time, until her husband shall have been absent seven years; and shall not have been heard of during that time. *Rhea et al.* vs. *Rhenner*. 108.

MASTER OF A VESSEL.

Insurance, 5.

MECHANICS BANK OF ALEXANDRIA.

1. The provision in the Act of Congress, incorporating "the Mechanics Bank of Alexandria," which requires, that the capital stock of the bank shall consist of 50,000 shares, of ten dollars each, is not a condition precedent; and the bank went legally into operation, with an actual capital less than that number of shares. *Minor* vs. *The Mechanics Bank of Alexandria*. 65.
2. Even if fraud had existed in the original subscription of this stock of the bank, it would be extremely difficult to maintain that such a fraud, which was private, between the original subscribers to the stock and the commissioners, could be set up to the injury of subsequent purchasers of the stock, who became *bona fide* holders of the same, without participation in, or notice thereof. *Ibid.* 65.
3. It is not a correct construction of the 3d and 21st sections of the Act of Congress, incorporating the Mechanics Bank of Alexandria, that the stock of the bank shall be deemed to belong to the persons in whose names it stands upon the books of the bank, and that the bank is not bound to recognise the interests of any *cestuy que trust*, and may refuse to permit the stock to be tranferred, whilst the nominal holder is indebted to the bank. *The Mechanics Bank of Alexandria* vs. *Louisa and Maria Seton*. 308.

MISTAKE.

Equity, 6. 8.

MORTGAGE.

It is true, that in discussions in Courts of Equity, a mortgage is sometimes called a lien, for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law. The estate is considered as a trust, and according to the intention of the parties, as a qualified estate, and security; where the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeasible. *Conard* vs. *The Atlantic Insurance Company*. 441.

NEW TRIAL.

An application for a new trial, on motion after verdict, addresses itself to the sound discretion of the Court; and if, upon the whole case, the verdict is substantially right, no new trial will be granted, although there may have been some mistakes committed on the trial. The application is not a matter of absolute right, but rests in the judgment of the Court, and is to be granted only in furtherance of justice. On a writ of error, bringing the proceedings on the trial, by bill of exceptions, to the cognizance of the Appellate Court, the directions of the Court below, must then stand or fall, upon their own intrinsic propriety, as matters of law. *M'Lanahan* vs. *The Universal Insurance Company*. 183.

NOLLE PROSEQUI.

1. According to modern decisions, a *nolle prosequi* does not amount to a *retraxit*, but simply to an agreement not to proceed further in that suit, as to the particular person, or cause of action, to which it was applied. *Minor et al.* vs. *The Mechanics Bank of Alexandria*. 74.
2. In an action on a joint and several bond, some of parties, sureties, severed in their pleadings from the principal, and a trial and verdict were had against them; afterwards the principal was called upon to plead, and he did so—judgment was then entered against the sureties, and a *nolle prosequi* entered against the principal. To this judgment, or the proceedings, no exception was taken in the Court below, nor was a new trial asked by the sureties. The Court held, that there is no decision exactly in point to the case; that there is no distinction between the entry of a *nolle prosequi*, before, and the entry after judgment, as applicable to this case. The decisions of the Courts of the United States, upon this proceeding, have been on the ground that the question is matter of practice and convenience. *Ibid.* 75.
3. When the defendants sever in their pleadings, a *nolle prosequi* ought to be allowed against one defendant. It is a practice which violates no rules of pleading, and will subserve the public convenience. In the administration of justice, matters of form, not absolutely subjected to authority, may well yield to the substantial purposes of justice. *Ibid.* 80.

NONSUIT.

1. The Courts of the United States have no authority to order a peremptory nonsuit, against the will of the plaintiff, on the trial of a cause before a jury. The plaintiff might agree to a nonsuit, but if he do not so choose, the Court cannot compel him to submit to it. *Elmore* vs. *Grymes*. 471.
2. A nonsuit may not be ordered by the Court, in any case, without the consent and acquiescence of the plaintiff. *D'Wolf* vs. *Rabaud et al.* 497.

OFFICIAL BONDS.

1. The condition of an official bond, that the officer who gives it, shall "well and truly" execute the duties of his office, includes not only honesty, but reasonable skill and diligence. If the duties are performed negligently and unskilfully; if they are violated from want of capacity or want of care; they can never be said to have been "well and truly executed." *Minor et al.* vs. *The Mechanics Bank of Alexandria*. 69.
2. No act or vote of the Board of Directors of a bank, in violation of their own duties, and in fraud of the rights and interests of the stockholders of the bank, will justify the Cashier of the bank in acts which are in violation of the stipulation in his official bond "well and truly" to execute the duties of his office. Acts done by a Cashier, under the authority of such a vote, or of a usage permitted by the directors, in violation of the trusts assumed by them, are on the responsibility of the Cashier and of his sureties. *Ibid.* 71.
3. The official bond of the Cashier, must be construed to cover all defaults in duty, which are annexed to the office, from time to time, by those who are authorized to control the affairs of the bank; and the sureties in the bond are presumed to enter into a contract, with reference to the rights and authorities of the president and directors, under the charter and by-laws. *Ibid.* 73.
4. The claim of the United States upon an official bond, and upon all parties thereto, is not released by the laches of the officer, to whom the assertion of this claim is intrusted by law. Such laches have no effect whatsoever, on the rights of the United States, as well against the sureties, as the principal in the bond. *Dox* vs. *The Postmaster-General*. 325.

PAROL EVIDENCE.

The Court held, that parol evidence was admissible, to show the agreement relative to the place where payment of a note was to be demanded; although the agreement did not appear on the face of the note. Such an agreement, is a circumstance extrinsic to the contract made by the note; and its proof, by parol, is regular. *Brent's Executors* vs. *The Bank of the Metropolis*. 92.

PARTIES.

1. Chancery practice. 3, 9, 12, 13.
2. The affidavit of a party to the cause, of the loss or destruction of an original paper, offered in order to introduce secondary evidence of the contents of the paper, is proper. If such affidavit could not be received of the loss of a written contract, the contents of which are well known to others, or a copy of which can be proved, a party might

PARTIES.

be completely deprived of his rights, at least in a Court of Law. *Taylor* vs. *Riggs*. 596.

3. It is a sound general rule, that a party cannot be a witness in his own cause; but many collateral questions arise in the progress of a cause, to which the rule does not apply. Questions which do not involve the matter in controversy, but matter which is auxiliary to the trial, and which facilitates the preparation for it, often depends on the oath of the party. An affidavit of the materiality of a witness for the purpose of obtaining a continuance, or a commission to take depositions, or an affidavit of his inability to attend, is usually made by the party, and received without objection. On incidental questions, which do not affect the issue to be tried by the jury, the affidavit of the party is received. *Ibid.* 596.

PARTNER AND PARTNERSHIP.

1. One partner, during the continuance of the partnership, cannot bind the other partner to a submission of the interests of both, to arbitration; but he might bind himself, so as to submit his own interests to such decision. *Karthaus* vs. *Ferrer et al.* 228.
2. Pleas and Pleadings. 14.

PAYMENT.

When no specific time for the payment of money is fixed in a contract by which the same is to be paid by one party to the other, in judgment of law, the same is payable on demand. *The Bank of Columbia* vs. *Hagner*. 463.

PEDIGREE.

1. A letter from a deceased member of a family, stating the pedigree of the family, and sworn by the wife to have been written by her husband, who also swore, in her deposition, that the facts stated in the letter, had been frequently mentioned by her husband in his lifetime, is legal evidence; as is also the deposition of the witness, in a question of pedigree. *Elliott et al.* vs. *Peirsol et al.* 337.
2. The rule of evidence, that in questions of pedigree, the declarations of aged and deceased members of the family, may be proved, and given in evidence, has not been controverted. *Ibid.* 337.
3. In a case where a controversy had arisen, or was expected to arise, between parties, concerning the validity of a deed, against which one of the parties claimed, but no controversy was then expected to arise about the heirship; a letter then written, stating the pedigree of the claimants, was not considered as excluded, by the rule of law, which declares, that declarations relating to pedigree, made *post litem motam*, cannot be given in evidence. *Ibid.* 337.

PLEAS AND PLEADINGS.

1. Surplusage in pleading, does not, in any case, vitiate, after verdict. *Carroll* vs. *Peake*. 23.
2. In a declaration upon an agreement by way of lease, by which the lessor stipulated to let a farm, from the first of January 1820, to remove the former tenant, and that the lessor should have the tenancy and occupation of the farm from that day, free from all hindrance; the assignment of breaches was, that, although specially requested on the said 1st of January, the defendant refused, and neglected to turn out

PLEAS AND PLEADINGS.

the former tenant, who then was, or had been, in the possession and occupancy of the land, and to deliver possession thereof to the plaintiff; this assignment is sufficient. *Ibid.* 23.

3. It is sufficient, that the averment should state the plaintiff's readiness and offer, and his request, on the first day of January generally, and not at the last convenient hour of that day; and if an averment of a personal demand is made, it need not have been on the land. *Ibid.* 24.
4. The strict doctrines relative to averments in pleading, have been applied to special pleas in bar, of tender, and some others of a peculiar character, and depending upon their own particular reasons. *Ibid.* 24.
5. Declarations containing general averments of readiness and request, have been held sufficient, especially after verdict, unless in very peculiar cases. *Ibid.* 24.
6. The law requires every issue to be founded upon some certain point, that the parties may come prepared with their evidence, and not be taken by surprise, and the jury may not be misled by the introduction of various matters. *Minor et al.* vs. *The Mechanics Bank of Alexandria.* 67.
7. What defects in pleading are, and are not, cured by verdict. *Ibid.* 67.
8. On a joint and several bond, the plaintiff may sue one or all of the obligors; but, in strictness of law, he cannot sue an intermediate number. He must sue all or one. But if such error is not taken advantage of by plea in abatement, it is waived by pleading to the merits. *Ibid.* 73.
9. Nolle prosequi. 1, 2, 3.
10. Where it was omitted to allege in the declaration on a promissory note, a demand of payment on the person of the maker, but it averred a demand at the bank, "where the note was negotiable," such averment in the declaration, could not be true, unless there was an agreement between the parties, that the demand should be made there; and the averment must have been proved at the trial, or the plaintiff could not have obtained a verdict and judgment; and, after a verdict, the judgment will be sustained. *Brent's Executors* vs. *The Bank of the Metropolis.* 93.
11. After the filing of a new count to a declaration, the defendant, who to the former counts has pleaded the general issue, or any particular plea, may withdraw the same, and plead anew, either the general issue, or any further or other pleas, which his case may require; but he may, if he please, abide by his plea already pleaded, and waive his right of pleading, *de novo*. The failure to plead, and going to trial without objection, are held to be a waiver of his right to plead, and an election to abide by his plea; and if it, in terms, purports to go to the whole action, it is deemed sufficient to cover the whole declaration; and puts the plaintiff to the proof of his case, on the new, as well as on the old counts. *Wright et al.* vs. *The Lessee of Hollingsworth.* 169.
12. When, upon a submission by one partner of all matters in controversy between the partnership and the person entering into the agreement of reference; an award was made, directing the payment of money, in an action on the bond, to abide by the award; the breach assigned, was, that the partner who agreed to the reference did not pay, &c.; this is a sufficient assignment of a breach, as he only who agreed to the reference was bound to pay. *Karthaus* vs. *Ferrer et al.* 231.

PLEAS AND PLEADINGS.

13. Attachment. 1.

14. The principle is, that a contract made by co-partners is several as well as joint, and the assumpsit is made by all and by each. It is obligatory on all, and on each of the partners. If, therefore, the defendant fails to avail himself of the variance in abatement, when the form of his plea obliges him to give the plaintiff a proper action; the policy of the law does not permit him to avail himself of it at the time of trial. *Berry* vs. *Fuyles*. 317.

15. The declaration in an action against one partner only, never gives notice of the claim being on a partnership transaction. The proceeding is always, as if the party sued was the sole contracting party; and if the declaration were to show a partnership contract, the judgment against the single partner could not be sustained. *Ibid.* 317.

16. A question of the citizenship of a party to a cause, cannot constitute a part of the issue on the merits; and must be brought forward by a proper plea in abatement, in an earlier stage of the cause, than the trial on the merits. *D' Wolf* vs. *Rabaud et al.* 498.

17. The plaintiff, as administrator of W., had brought a suit in the District Court of the United States, for the Western District of Pennsylvania, and recovered a judgment; and upon this judgment, he instituted a suit in the District Court of the United States, of the state of Mississippi, against the defendant in the original suit. The defendant pleaded, that, by the Orphans' Court of Adams county, in the state of Mississippi, where the defendant resided, he had been appointed the administrator of W., and had continued to act in that capacity. Held, that the debt due upon the judgment obtained in Pennsylvania, by the plaintiff, as administrator of W., was due to him in his personal capacity, and it was immaterial whether the defendant was or was not administrator of W., in the state of Mississippi. That would not, in in any manner, affect the rights of the plaintiff; and the plea tenders an immaterial issue, and is bad on demurrer. *Biddle* vs. *Wilkins*. 691.

18. Where the Court in which judgment is rendered, has not jurisdiction over the subject matter of the suit, or where the judgment upon which suit is brought, is absolutely void, this may be pleaded in bar; or may, in some cases, be given in evidence, under the general issue, in an action brought upon the judgment. *Ibid.* 691.

19. The general rule is, that there can be no averment in pleading against the validity of a record, though there may be against its operation; and it is upon this ground, that no matter of defence can be pleaded in such case, to a suit on a judgment which existed anterior to the judgment. *Ibid.* 692.

20. It has become a settled practice in declaring in an action upon a judgment, not, as formerly, to set out in the declaration the whole of the proceedings in the original suit, but only to allege generally, that the plaintiff, by the consideration and judgment of that Court, recovered the sum mentioned therein, the original cause of action having passed *in rem judicatam*. *Ibid.* 692.

21. In an action upon a judgment recovered in favour of an administrator, the plaintiff is not bound to make a profert of the letters of administration. That it is not necessary in actions upon such judgments, that the plaintiff name himself as administrator, follows, from his not being bound to make profert of the letters of administration; and when he does so name himself, it may be rejected as surplusage. *Ibid.* 692.

POST-OFFICE DEPARTMENT.

The Act of Congress, for regulating the Post-Office Department, does not, in terms, discharge the obligors in the official bond of a Deputy Postmaster, from the direct claim of the United States upon them, on the failure of the Postmaster-General to commence a suit against the defaulting Postmaster, within the time prescribed by law. Their liability, therefore, continues. They remain the debtors of the United States. The responsibility of the Postmaster-General is superadded to, not substituted for, that of the obligors. *Dox et al.* vs. *The Postmaster-General.* 323.

PRACTICE.

1. Chancery Practice, *passim.*
2. In a trial in an action of ejectment, in which, according to the provisions of the laws of Tennessee, the defendant was held to bail, the declaration stated two demises, by H. & K., citizens of Pennsylvania; and the other, the demise of B. & G. citizens of Massachusetts. The cause coming on for trial before a jury, the plaintiffs suffered a nonsuit, which was set aside; and the Court, on the motion of the plaintiffs, permitted the declaration to be amended, by adding a count on the demise of S., a citizen of Missouri. The parties went to trial without any other pleading; and the jury found for the plaintiff, upon the third, or new count, and a judgment was rendered in his favour. Held to be valid. *Wright et al.* vs. *The lessee of Hollingsworth.* 165.
3. The allowance and refusal of amendments in the pleadings—the granting and refusing new trials; and most of the other incidental orders, made in the progress of a cause, before trial; are matters so peculiarly addressed to the sound discretion of the Courts of original jurisdiction, as to be fit for their decision only, under their own rules and modes of practice. This Court has always declined interfering in such cases. *Ibid.* 165.
4. On a trial upon the merits, it is too late to take exception to the capacity of the plaintiff to sue, this should have been done by a plea in abatement, before the trial; and the omission to do this is a waiver of the objection. *Conard* vs. *The Atlantic Insurance Company.* 450.
5. When the state of the record did not show a judgment of nonsuit to have been entered, although the bill of exceptions states the fact, the plaintiff may apply for a *certiorari* to bring up a perfect record, or dismiss the writ of error, and proceed *de novo*. *Elmore* vs. *Grymes.* 472.
6. The state of Ohio, not having been admitted into the Union until 1802, the Act of Congress passed May 8th 1792, which is expressly confined in its operations to the day of its passage, in adopting the practice of the state Courts into the Courts of the United States, could have no operation in that state; but the District Court of the United States, established in that state in 1803, was vested with all the powers and jurisdiction of the District Court of Kentucky, which exercised full Circuit Court jurisdiction, with power to create a practice for its own government. The District Court of Ohio did not create a system for itself, but finding one established in the state, in the true spirit of the policy pursued by the United States, proceeded to administer justice according to the practice of the state Courts, and by a single rule adopted the state system of practice. When in 1807, the seventh Circuit was established, the judge assigned to that Circuit, found the practice of the state adopted, in fact, into the Circuit Court of the United States, and the same has since,

PRACTICE.

so far as it was found practicable and convenient, by a uniform understanding, been pursued without any positive rule upon the subject. *Fullerton* vs. *The Bank of the United States.* 612.

7. The Act of 18th February, 1820, relative to proceedings against parties to promissory notes, was a very wise and benevolent law, and its salutary effects produced its immediate adoption into the practice of the Courts of the United States, and the suits have in many instances been prosecuted under it. *Ibid.* 613.
8. It will not be contended, that the practice of a Court can only be sustained by written rules, nor that a party pursuing a form or mode of proceeding, sanctioned by the most solemn Acts of the Court through a course of years, is to be surprised and turned out of Court upon a ground which has no bearing upon the merits. Written rules are unquestionably to be preferred, because of their certainty; but there can be no want of certainty where long acquiescence has established it to be the law of the Court, that the state practice shall be their practice, as far as they have the means of carrying it into effect, or until deviated from by positive rules of their own making. *Ibid.* 613.
9. Although the Act of the legislature of Ohio regulating the mode of proceeding in actions on promissory notes, was passed after the making of the note upon which this action was brought, yet the Circuit Court of the United States for the district of Ohio, having incorporated the action under that statute, with all its incidents, into its course of practice, and having full power by law to adopt it, there does not appear any legal objection to its doing so, in the prosecution of the system under which it has always acted. *Ibid.* 615.
10. Where the record from the Court below, contained the whole proceedings in the case, and exhibited all the matters either party required for a final disposition of the case, and the counsel for both the appellant and the appellees, were willing to submit, upon argument, the whole case to the final decision of the Court, but it appeared that the Circuit Court of Ohio had not decided any question, but that which had been raised upon the jurisdiction of the Court; the counsel were directed by this Court to argue the point of jurisdiction only. *M'Donald* vs. *Smalley et al.* 621.

PRESIDENT OF THE UNITED STATES.

See Army of the United States, 2, 3.

PRINCIPAL AND AGENT.

The officers of a bank are held out to the public, as having authority to act according to the general usage, practice, and course of their business; and their acts within the scope of such usage, practice, and course of business, would, in general, bind the bank in favour of third persons, possessing no other knowledge. *Minor et al.* vs. *The Mechanics Bank of Alexandria.* 70.

PRIORITY OF THE UNITED STATES.

1. What is the nature and effect of the priority of the United States, under the statute of 1799, chap. 128, sec. 65. *Conard* vs. *The Atlantic Insurance Company.* 438.
2. It is obvious, that the latter clause of the 65th section of the Act of 1799, is merely an explanation of the term "insolvency" used in the first clause, and embraces three classes of cases, all of which relate to living debtors. The case of deceased debtors, stands wholly upon the alternative, in the former part of the enactment. *Ibid.* 439.

PRIORITY OF THE UNITED STATES.

3. Insolvency, in the sense of the statute, relates to such a general divestment of property, as would in fact be equivalent to insolvency in its technical sense. It supposes, that all the debtor's property has passed from him. This was the language of the decision in the case of the United States *vs.* Hooe, 3 *Cranch*, 73; and it was consequently held, that an assignment of part of the debtor's property, did not fall within the provision of the statute. *Ibid.* 439.
4. Mere inability of the debtor to pay all his debts, is not an insolvency within the statute; but it must be manifested in one of the three modes, pointed out in the explanatory clause of the section. *Ibid.* 439.
5. The priority, as limited, and established in favour of the United States, is not a right which supersedes and overrules the assignment of the debtor, as to any property which the United States may afterwards elect to take in execution, so as to prevent its passing by virtue of such assignment to the assignees; but it is a mere right of prior payment, out of the general funds of the debtor, in the hands of the assignees; and the assignees are rendered personally liable, if they omit to discharge the debt due to the United States. *Ibid.* 439.
6. It is true, that in discussions in Courts of Equity a mortgage is sometimes called a lien, for a debt; and so it certainly is, and something more; it is a transfer of the property itself, as security for the debt. This must be admitted to be true at law, and it is equally true in equity; for in this respect equity follows the law. The estate is considered as a trust, and according to the intention of the parties, as a qualified estate and security. When the debt is discharged, there is a resulting trust for the mortgagor. It is therefore only in a loose and general sense, that it is sometimes called a lien; and then only by way of contrast, to an estate absolute and indefeisible. *Ibid.* 441.
7. It has never yet been decided by this Court, that the priority of the United States will divest a specific lien, attached to any thing, whether it be accompanied by possession or not. *Ibid.* 441.
8. The case of Thelluson *vs.* Smith, 2 *Wheat.* 396, turned upon its own particular circumstances, and did not establish any principles different from those which are recognised in this case. And it establishes no such proposition, as that a specific and perfected lien can be displaced by the mere priority of the United States. *Ibid.* 444.
9. It is not understood, that a general lien, by judgment on lands, constitutes, *per se*, a property or right in the land itself. It only confers a right to levy on the same, to the exclusion of other adverse interests, subsequent to the judgment; and when the levy is actually made on the same, the title of the creditor relates back to the time of the judgment, so as to cut out intermediate incumbrances. But subject to this, the debtor has full power to sell or otherwise dispose of the land. *Ibid.* 443.

PROMISSORY NOTE.

1. In an action against the endorser of a promissory note, made "negotiable in the Bank of the Metropolis," the declaration averred a demand of the same, at that bank. No other notice of the non-payment of the note, was sent to the endorser, but that left for him at the Bank of the Metropolis; and it was proved, that there was an agreement, by parol, with the endorser, as to other notes discounted previously, by the bank, for his accommodation, that payment, and

PROMISSORY NOTE.

demand of payment, should be made at the bank: the endorser residing a considerable distance from the bank. Held to be sufficient. *Brent's Executors* vs. *The Bank of the Metropolis.* 89.

2. The endorser of such a note, is himself bound by the contract made by the drawer, and by the established and known usage of the bank. *Ibid.* 93.
3. A promissory note was made at Georgetown, payable at the Bank of Columbia, in that town; the defendant, the endorser of the note, living in the county of Alexandria within the District of Columbia, and having, what was *alleged* to be, a *place of business* in the City of Washington; and the notice of the non-paymennt of the note, enclosed in a letter and superscribed with his name, was put into the post-office at Georgetown, addressed to him at that place. Held that this notice was sufficient. *The Bank of Columbia* vs. *Lawrence.* 582.
4. In cases where the party entitled to notice resides in the country, unless notice sent by the mail is sufficient, a special messenger must be employed for the purpose of sending it, but this case is not one which required such a duty. *Ibid.* 582.
5. If the defendant had a place of business in the City of Washington, and the notice served there would be good, yet it by no means follows, that service at his place of residence in another place, would not be equally good. Parties may be and frequently are so situated, that notice may well be given at either of several places. *Ibid.* 582.
6. That is not properly a place of business, in the commercial understanding of the terms, which has no public notoriety as such, no open or public business carried on at it by the party, but only occasional employment by him there, two or three times a week, in a house occupied by another person, the party only engaged in settling up his old business. *Ibid.* 582.
7. The general rule is, that the party whose duty it is to give notice of the dishonour of a bill or note, is bound to use due diligence in communicating the same. But it is not required of him to see that the notice is brought home to the party. He may employ the usual and ordinary modes of conveyance; and whether the notice reaches the party or not, the holder has done all that the law requires of him. *Ibid.* 582.
8. It seems to be well settled, that when the facts are ascertained and undisputed, what shall constitute due diligence in a question of law. *Ibid.* 583.
9. The rules relative to diligence ought to be reasonable, and founded in general convenience, and with a view to clog, as little as possible, consistently with the safety of the parties, the circulation of paper of this description. *Ibid.* 583.
10. When a person has a dwelling house and a counting-room in the same city or town, a notice sent to either place is sufficient;—if parties live in different post towns, notice through the post-office is sufficient. Notice, to a party living at another place than the holder, sent by mail to the nearest post-office, is good under common circumstances, and in such cases where notice is sent by mail, it is distance alone, or the usual course of receiving letters, which must determine the sufficiency of the notice. *Ibid.* 583.
11. Some countenance has lately been given in England, to the practice of sending a notice by a special messenger in extraordinary cases, by allowing the holder to recover of the endorser the expenses of serving the notice in this manner. The holder is not bound to use

PROMISSORY NOTE.

the mail for the purpose of sending the notice. He *may* employ a special messenger if he pleases, but it has not been decided that he *must*. To compel the holder to the expense of a special messenger would be unreasonable. *Ibid.* 584.

12. Modern decisions go to establish, that if a note be at the place where it is payable, on the day it falls due, the *onus* of proving payment falls upon the parties who are liable to pay it; and the instructions of the Circuit Court, in this case, were more favourable to the parties to the note, where the Court said, upon the sufficiency of the demand, that on an article or a note made payable at a particular bank, it is sufficient to show that the note had been discounted, and become the property of the bank, and that it was in the bank, and not paid when at maturity. *Fullerton* vs. *The Bank of the United States.* 616.

RECORDING OF DEEDS.

1. The registry Act of Ohio directs that all deeds made within the state shall be recorded within six months from the time of the actual execution thereof, and declares, that if any such deed shall not be recorded in the county where the land lies, within the limits allowed by the law, "the same shall be deemed fraudulent and void, against any subsequent purchaser, for a valuable consideration, without notice of such deed." *Steele's Lessee* vs. *Spencer.* 559.
2. In the construction of the registry Act of Ohio, the term "purchasers," is usually taken in its limited legal sense. It means a complete purchaser; or in other words, a purchaser clothed with a legal title. *Ibid.* 559.
3. It is not necessary that a deed made to a subsequent *bona fide* purchaser without notice, shall be recorded to give it operation against a prior unrecorded deed, as by the provisions of the registry Acts the prior deed is declared in itself absolutely void as against such purchaser. *Ibid.* 560.
4. A decree of the Supreme Court of Ohio ordered that the patentee of a certain tract of land, should, within six months, make a deed, &c. with covenants of warranty conveying a portion of the land held under a patent to the complainants in that suit, and on the failure of A to make the said deed, &c. "that then and in that case, the complainant shall hold, possess and enjoy the said portion of land, in as full and ample a manner, as if the same had been conveyed to him." The decree of the Supreme Court of Ohio, by which a conveyance of land is directed to be made, the decree being according to the laws of Ohio, vested in those to whom the deed was ordered to be made, such a legal title to the land to have been conveyed by the deed as would have been vested by a deed of equal date; and the registry Act of Ohio applies as well to a title under such a decree, as it would do, if the party held under a *bona fide* deed of the same date with the patent of the land, and the decree gives a legal title as ample as a deed. *Ibid.* 558.
5. Deeds, 2, 5, 6, 7, 8, 9.
6. The provisions of the laws of Kentucky, relative to the acknowledgment of deeds, for the purpose of recording the same. *Elliott* vs. *Peirsol.* 339.

RELEASE.

At *Common Law*, the release of a debtor whose person is in execu-

RELEASE.

tion, is a release of the judgment itself. The law will not permit proceedings by a creditor at the same time against the person and estate of his debtor, and where an election has been made to take the person, it presumes satisfaction, if the person be voluntarily released. *The United States* vs. *Stansbury et al.* 575.

RESPONDENTIA.

1. It is not necessary that a *respondentia* loan should be made before the departure of the ship on the voyage; nor that the money loaned, should be employed in the outfit of the vessel, or invested in the goods on which the risk is run. *Conard* vs. *The Atlantic Insurance Company.* 436.
2. It matters not, at what time the loan is made, nor upon what goods the risk is taken. If the risk of the voyage be substantially and really taken; if the transaction be not a device to cover usury, gaming, or fraud; if the advance be in good faith, for a maritime premium; it is no objection to it, that it was made after the voyage was commenced, nor that the money was appropriated to purposes wholly unconnected with the voyage. *Ibid.* 437.
3. The lender on *respondentia*, is not presumed to lend on the faith of any particular appropriation of the money; and if it were otherwise, his security could not be avoided by any misapplication of the fund, where the risk was *bona fide* run, upon other goods; and it was not a mere contract of wager and hazard. *Ibid.* 437.
4. It seems, that the common and usual form of a *respondentia* bond, is that which was used in this case. *Ibid.* 437.

SPECIFIC PERFORMANCE.

1. Chancery Practice, 11.
2. Barry *vs.* Coombe, 640.

STATE LAWS.

1. Under the law of Virginia, a confession of Judgment by the defendant, is a release of errors. *Mandeville* vs. *Suckley et al.* 136.
2. Courts of the several states, 1, 2, 3, 4, 5.
3. The Act of the legislature of Maryland, passed 19th December 1791, entitled "An Act concerning the territory of Columbia, and the City of Washington," which, by the 6th section, provides for the holding of lands by "foreigners," is an enabling Act; and applies to those only who could not take lands without the provisions of that law. It enables a "foreigner" to take in the same manner as if he were a citizen. *Spratt* vs. *Spratt.* 349.
4. A foreigner who becomes a citizen, is no longer a foreigner, within the view of the Act. Thus *after purchased lands*, vest in him as a citizen, not by virtue of the Act of the legislature of Maryland, but because of his acquiring the rights of citizenship. *Ibid.* 349.
5. Lands in the county of Washington, and District of Columbia, purchased by a foreigner, before naturalization, were held by him under the law of Maryland, and might be transmitted to the relations of the purchaser, who were foreigners; and the capacity so to transmit those lands, is given absolutely, by this Act, and is not affected by his becoming a citizen; but they pass to his heirs and relations, precisely as if he had remained a foreigner. *Ibid.* 349.
6. The statute of limitations in Kentucky, is substantially the same with the statute of 21 James 2, ch. 16, with the exception, that it substi-

STATE LAWS.

tutes the term of *five* years instead of *six*. The English decisions have, therefore, been resorted to in this case, in the construction of the statute of Kentucky, and are entitled to great consideration. They cannot be considered as conclusive upon the construction of a statute passed by a state, upon a like subject; for this belongs to the local state tribunals, whose rules of interpretation, must be presumed to be founded upon a more just and accurate view of their own jurisprudence. *Bell* vs. *Morrison*. 359.

7. If the doctrines of the Kentucky Courts, in the construction of a statute of that state, are irreconcilable with the English decisions, upon a statute in similar terms; this Court, in conformity with its general practice, will follow the local law, and administer the same justice which the state Court would administer between the same parties. *Ibid.* 360.
8. The decisions in the Courts of New-York on the construction of its own statute of frauds, and the extent of the rules deduced from it, present to this Court a guide in its decisions upon the construction of their statute. *D'Wolf* vs. *Rabaud et al.* 501.
9. In an action of ejectment to recover land in Kentucky, the law of real estate in Kentucky, is the law of this Court, in deciding the rights of the parties. *Davis* vs. *Mason*. 505.
10. Under the law of the state of Kentucky, and the decisions of their Courts upon it, a will with two witnesses is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Ibid.* 508.
11. It is a settled rule in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it. *Ibid.* 508.
12. The Orphans' Court, by the testamentary laws of Maryland, has a general power to administer justice in all matters relative to the affairs of deceased persons, according to law. The commission to be allowed to an executor or administrator, is submitted to the discretion of the Court, and is to be not under five per cent., nor exceeding ten per cent. on the amount of the inventory. *Nicholls et al.* vs. *Hodges' Ex.* 565.
13. Under the laws of Virginia relative to the estate of deceased persons, lands are never appraised. *Archer et al.* vs. *Deneale et al.* 589.
14. Practice, 5, 6, 7, 8.
15. Under the law of Virginia, which directs the sheriff holding an execution against the goods and effects of defendants, to take forthcoming bonds, for the property levied upon by the execution, and authorizes execution to issue for the amount of the debt due upon the original execution, after *ten days' notice* to the obligors in the bond of the motion for execution, the property levied on not having been re-delivered, according to the condition of the bond; if the notice given to the obligees, of the plaintiff's intention to proceed, is sufficiently explicit to render mistake impossible, it will be sustained, although the whole of the defendants in the original execution, may not be named in the notice. Nice and technical objections to the notice, where every purpose of substantial justice is effected, ought not to be favoured. *Alexander* vs. *Brown*. 684.

STATUTE OF FRAUDS.

1. The statute of Frauds of New-York, is a transcript on this subject, of the statute 29 Charles 2d, ch. 3. It declares, that no action shall be

brought to charge a defendant on a special promise for the debt, default, or miscarriage of another, unless the agreement, or some memorandum, or note thereof, be in the writing and signed by the party, or by some one by him authorized. The words "collateral" or "original" promise, do not occur in the statute; and have been introduced by Courts to explain its objects, and expound its true interpretation. *D'Wolf* vs. *Rabaud et al.* 499.

2. Whether, by the true intent of the statute of Frauds, it was to extend to cases where the collateral promise, (so called,) was a part of the original agreement, and founded on the same consideration, moving at the same time, between the parties; or whether it was confined to cases where there was already a subsisting debt or demand, and the promise was merely founded upon a subsequent and distinct understanding; might, if the point were entirely new, deserve very grave deliberation. But it has been closed within very narrow limits by the course of the authorities, and seems scarcely open for general examination; at least in those states, where the English authorities have been fully recognised and adopted in practice. *Ibid.* 499.
3. If A agree to advance B a sum of money for which B is to be answerable, but at the same time it is expressly upon the understanding that C will do some act for the security of A, and enter into an agreement with A for that purpose, it would scarcely seem a case of mere collateral undertaking, but rather a trilateral contract. The contract of B to repay the money, is not coincident with, nor the same contract with C to do the act. Each is an original promise; though the one may be deemed subsidiary or secondary to the other. The original consideration flows from A, not solely upon the promise of either B or C, but upon the promise of both, *diverso intuita*, and each becomes liable to A, not upon a joint, but a several original undertaking. Each is a direct original promise, founded upon the same consideration. *Ibid.* 500.
4. The case of Wain *vs.* Warlters, (5 *East*, 10,) was the first case which settled the point, that it was necessary in order to escape from the statute of Frauds, that the agreement should contain the consideration for the promise as well as the promise itself. If it contain it, it has since been determined that it is wholly immaterial whether the consideration be stated in express terms, or by necessary implication. That case has been adopted, to a limited extent, by the Courts of New-York into its jurisprudence, as a sound construction of the statute. *Ibid.* 501.
5. The statute of Frauds in Maryland requires written evidence of the contract, or a Court cannot decree performance. The words of the statute are "unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized." *Barry* vs. *Coombe*, 650.
6. A note or memorandum in writing of the agreement between parties, is sufficient under the statute of Frauds of Maryland; and in order to obtain specific performance in equity, the note in writing must be sufficient to sustain an action at law. The form is not regarded, or the place of signature, provided it be in the handwriting of the party, or his agent, and furnish evidence of a complete and practicable agreement. A Court of Equity will supply no more than the ordinary incidents to such an agreement, such as the ingredients of a complete transfer, usual covenants, &c. *Ibid.* 650.

STATUTE OF FRAUDS.

7. An examination of the cases will show that Courts of Equity are not particular, with regard to the direct and immediate purpose for which the written evidence of the contract was created. It is *written evidence* which the statute requires; and a note or letter, and even in one case a letter, the object of which was to annul the contract, on a ground really not unreasonable, was held to bring a case within the provisions of the statute. *Ibid.* 651.

8. Where, in an account stated by the parties, in the handwriting of the defendant, his name being written by him at the head of the account, a balance was acknowledged to be due by him to the complainant in the bill for a specific performance, there was the following credit; "*By my purchase of your half, E. B. wharf and premises this day agreed upon between us, $7578 63*;" it was held to be a sufficient memorandum in writing under the statute of Frauds of Maryland, upon which the Court could decree a specific performance of the sale of the estate referred to; other matters appearing in evidence, and by the admissions of the defendant in his answer, to show the particular property designated by "*your ½ E. B. wharf and premises.*" *Ibid.* 651.

STATUTE OF LIMITATIONS.

1. The statute of limitations, instead of being viewed in an unfavourable light, as an unjust and discreditable defence, should have received such support from Courts of Justice, as would have made it, what it was intended, emphatically, to be, a statute of repose. It is a wise and beneficial law, not designed merely to raise a presumption of payment of a just debt, from lapse of time; but to afford security against stale demands, after the true state of the transaction may have been forgotten, or be incapable of explanation, by reason of the death or removal of witnesses. *Bell* vs. *Morrison.* 360.

2. An exposition of the statute of limitations, which is consistent with its true object and import, is that expressed by this Court, in the case of Wetzell vs. Bussard, (11 *Wheat.* 309,) "an acknowledgment which will revive the original cause of action, must be *unqualified* and *unconditional*—it must show, positively, that the debt is due, in whole or in part. If it be connected with the circumstances which in any manner affect the claim, or if it be conditional, it may amount to a new assumpsit, for which the old debt is a sufficient consideration; or if it be construed to revive the original debt, that revival is conditional, and the performance of the condition, or a readiness to perform it, must be shown." *Ibid.* 362.

3. If the bar of the statute is sought to be removed by the proof of a new promise, that promise, as a new cause of action, ought to be proved in a clear and explicit manner, and be in its terms, unequivocal and determinate; and if any conditions are annexed, they ought to be shown to have been performed. *Ibid.* 362.

4. The admission of a party of the existence of an unliquidated account, on which something is due to the plaintiff, but no specific balance is admitted, and no document produced at the time, from which it can be ascertained what the parties understood the balance to be, would not, by the Courts of Kentucky, be held sufficient to take the case out of the statute, and let in the plaintiff to prove, *aliunde*, any balance, however large it may be. It is indispensable for the party to prove, by independent evidence, the extent of the

STATUTE OF LIMITATIONS.

balance due to him, before there can arise any promise to pay it as a subsisting debt. *Ibid.* 365.

5. The acknowledgment of a debt by one partner, after a dissolution of the co-partnership, is not sufficient to take the case out of the statute, as to the other partners. *Ibid.* 373.
6. A dissolution of partnership puts an end to the authority of one partner to bind the other; it operates as a revocation of all power to create new contracts, and the right of partners as such, can extend no further than to settle the partnership concerns already existing, and distribute the remaining funds; and this right may be restrained by the delegation of this authority to one partner. *Ibid.* 370.
7. After a dissolution of a partnership, no partner can create a cause of action against the other partners, except by a new authority communicated to him for that purpose. *Ibid.* 373.
8. When the statute of limitations has once run against a debt, the cause of action against the partnership is gone. *Ibid.* 373.

SURETIES.

1. The claims of the United States, upon an official bond, and upon all the parties to it, is not released by the laches of the officer to whom the assertion of this claim is intrusted. Such laches have no effect whatsoever on the rights of the United States, *as well against* the *sureties*, as the principal in the Bond. *Dox* vs. *The Postmaster General.* 325.
2. The discharge, by the Secretary of the Treasury, of the principal in a bond to the United States, who is imprisoned under a *ca. sa.* issued against him, and who has assigned all his property for the use of the United States, does not impair or affect the rights of the United States to proceed against sureties for the amount due upon the judgment, and unpaid. *The United States* vs. *Stansbury et al.* 575.

TENANCY BY THE CURTESY.

1. It *seems* that the rigid rules of the common law do not require that the husband shall have had actual seisin of the lands of the wife, to entitle himself to a tenancy by courtesy, in waste, or what is sometimes styled "wild lands." *Davis et al.* vs. *Mason.* 506.
2. If a right of entry on lands exists, it ought to be sufficient to sustain the tenure acquired by the husband, where no adverse possession exists. *Ibid.* 508.
3. At present it is fully settled in equity, that the husband shall have courtesy of trust, as well as of legal estates, of an equity of redemption, of a contingent use, or money to be laid out in lands. *Ibid.* 508.

TERRITORIES.

1. The Constitution of the United States confers, absolutely, on the government of the Union, the power of making war, and of making treaties. Consequently, that government possesses the power of acquiring territory, either by conquest or by treaty. *The American Insurance Company* vs. 356 *bales of Cotton.* 542.
2. The usage of the world is, if a nation be not entirely subdued, to consider the holding of conquered territory as a mere military occupation, until its fate shall be determined at the treaty of peace. If it be ceded by treaty, the acquisition is confirmed, and the ceded territory becomes a part of the nation to which it is annexed; either on the terms stipulated in the treaty of cession, or on such as its new master

TERRITORIES.

shall impose. On such transfer of territory, it has never been held, that the relations of the inhabitants with each other undergo any change. Their relations with their former sovereign are dissolved, and new relations are created between them and the government, which has acquired their territory. The same act which transfers their country, transfers the allegiance of those who remain in it, and the law, which may be denominated political, is necessarily changed; although that which regulates the intercourse and general conduct of individuals, remains in force, until altered by the newly created power of the state. *Ibid.* 542.

3. Florida.
4. Jurisdiction.

TRUSTS AND TRUSTEES.

1. Where, by the terms of a deed conveying real estate in trust, to be sold for the benefit of the creditor of the grantor, the trustee is directed to sell the property conveyed, *by public auction*—the trustee was bound to conform to this mode of sale. This was the test of value, which the grantor thought proper to require; and it was not competent to the trustee to establish any other; although, by doing so, he might, in reality, promote the interests of those for whom he acted. *Greenleaf* vs. *Queen et al.* 145.
2. Agreement, 2.
3. Chancery Practice, 1, 2, 3.
4. Full notice of a trust, draws after it all the consequences of a full declaration of the trust, as to all persons chargeable with such notice. *The Mechanics Bank of Alexandria* vs. *Louisa & Maria Seton.* 309.
5. It is well settled in equity, that all persons coming into possession of trust property, with notice of the trust, shall be considered as trustees; and bound, with respect to that special property, to the execution of the trust. *Ibid.* 309.

UNITED STATES.

Lien of the United States for priority of payment. See *Priority of Payment. Lien.*

USAGE.

1. Bills of Exchange, 4, 5.
2. Promissory Note, 1.

USURY.

1. C. & Co. discounted their notes with the F. and M. Bank of Georgetown, at thirty days; and, in lieu of money, they stipulated to take the post notes of the bank, payable at a future day, without interest, while the post notes were at a discount of one and a half per cent. in the market, at the time of the transaction. Such a contract is usurious. The endorsement of a promissory note of a stranger to the transaction, which was passed to the bank as a collateral security for the usurious loan, although the note itself is not tainted with the usury, yet the endorsement is void, and passes no property to the bank, in the note; and the subsequent payment of the original note, for which the security was given, and the repayment of the sum received as usury, will not give legality to the transaction. *Gaither* vs. *The Farmers and Mechanics Bank of Georgetown.* 43, 44.
2. If a note be free from usury in its origin, no subsequent usurious transactions respecting it, can affect it with the taint of usury, although

USURY.

an endorser of the note, whose property in it was acquired through a usurious transaction, may not be able to maintain a suit upon it. *Ibid.* 43.

3. The Act of Assembly of Maryland, declares "all bonds, contracts, and assurances whatever, taken on an usurious contract, to be utterly void." And the endorsement of a promissory note, for a usurious consideration, is a contract within the statute, and was void. *Ibid.* 43.

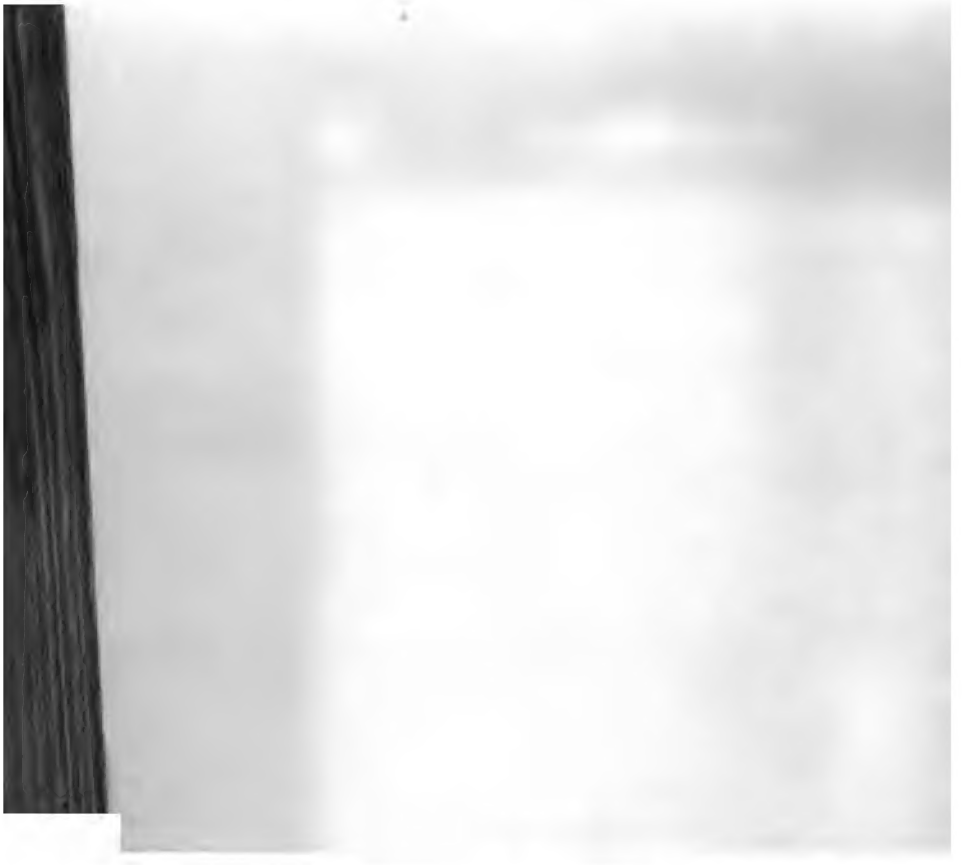
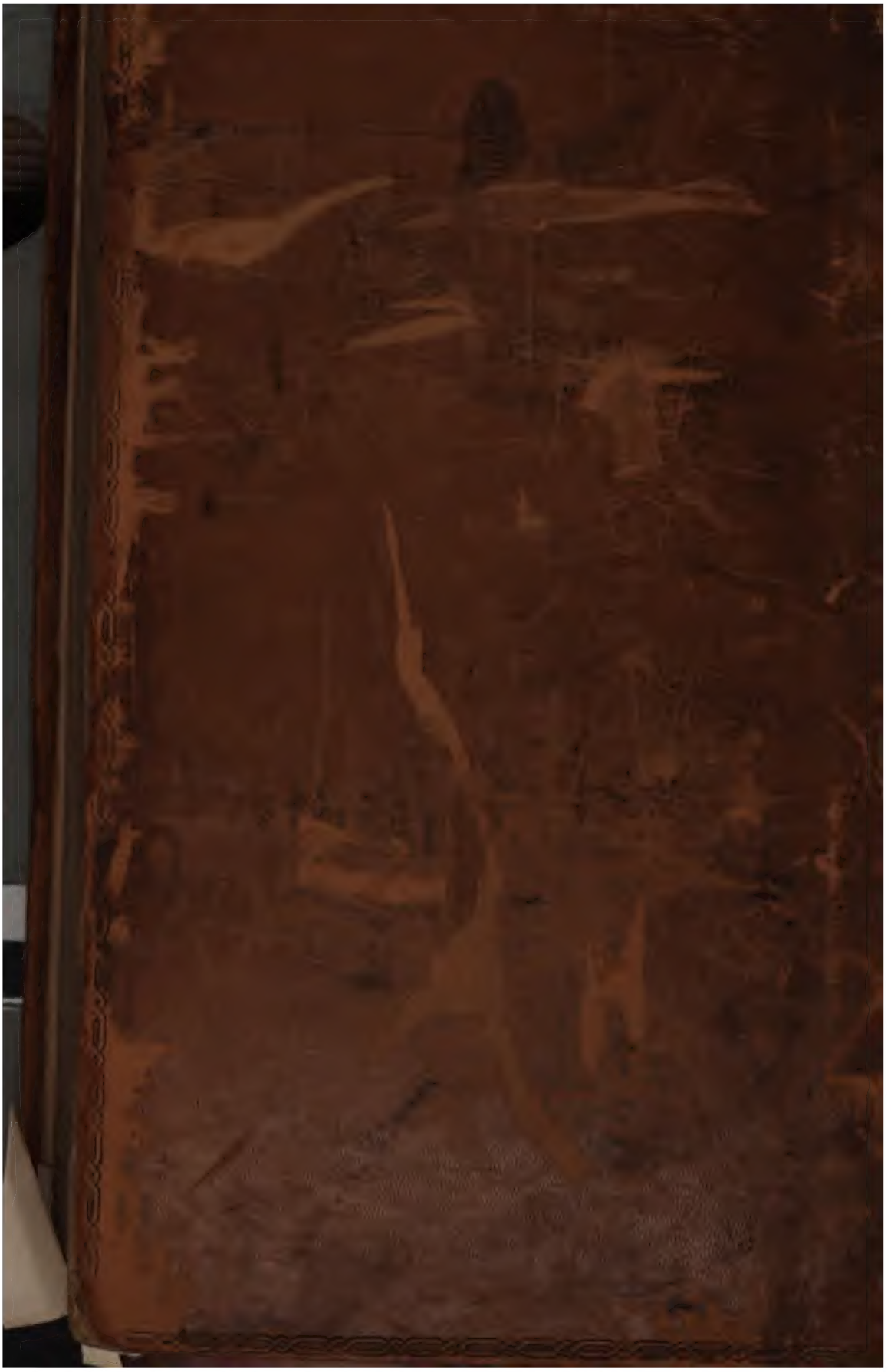
VENDOR AND VENDEE.

1. In contracts for the sale of land, by which one agrees to purchase, and the other to convey, the undertakings of the respective parties are always dependent, unless a contrary intimation clearly appears. *The Bank of Columbia* vs. *Hagner.* 464.
2. Although many nice distinctions are to be found in the books upon the question, whether the covenants or promises of the respective parties to the contract, are to be considered independent or dependent; yet it is evident the inclinations of Courts have strongly favoured the latter construction, as being obviously the most just. *Ibid.* 465.
3. In such cases, if either vendor or vendee, wish to compel the other to fulfil his contract; he must make his part of the agreement precedent, and cannot proceed against the other, without actual performance of the agreement on his part, or a tender and refusal. *Ibid.* 465.
4. An averment of performance is always made in the declaration upon contracts containing dependent undertakings, and that averment must be supported by proof. *Ibid.* 465.
5. The time fixed for the performance of a contract, is at law, deemed the essence of the contract, and if the seller is not ready and able to perform his part of the agreement on that day, the purchaser may elect to consider the contract at an end. But equity, which from its peculiar jurisdiction is enabled to examine into the cause of delay, in completing a purchase, and to ascertain how far the day named was deemed material by the parties, will, in certain cases, carry the agreement into execution, although the time appointed has elapsed. *Ibid.* 465.
6. It may be laid down as a rule, that, at law, to entitle the vendor to recover the purchase money, he must aver in his declaration performance of the contract on his part, or an offer to perform, at the day specified for the performance. And this averment must be sustained by proof; unless the tender has been waived by the purchaser. *Ibid.* 467.
7. If before the period fixed for the delivery of a deed for lands, the vendee has declared he would not receive it, and that he intended to abandon the contract, it may render a tender of the deed before the institution of a suit unnecessary. But this rule can never apply, except in cases where the act which is construed into a waiver, occurs *previous* to the time for performance. *Ibid.* 467.
8. The taking possession of property by the vendee, before conveyance, is a circumstance from which is to be inferred that he considered the contract closed, but would not deprive him of the right to relinquish the property, if the vendor could not make a title, or neglected to do so. After a relinquishment for such causes, the vendee could sustain an action to recover back the purchase money had it been paid. *Ibid.* 468.
9. Where the legal title cannot be conveyed to the vendee by the vendor, and the vendee must resort to a Court of Equity to establish his

VENDOR AND VENDEE.

title, notwithstanding a conveyance of all the right of the vendor to him, the Court will not compel him to pay the purchase money. It would be compelling him to take a law suit, instead of the land. *Ibid.* 468.

WILLS AND TESTAMENTS.

1. Under the law of the state of Kentucky, and the decisions of their Courts upon it, a will with two witnesses, is sufficient to pass real estate; and the copy of such a will, duly proved and recorded in another state, is good evidence of the execution of the will. *Davis et al.* vs. *Mason.* 508.
2. It is a settled rule, in Kentucky, that although more than one witness is required to subscribe a will disposing of lands, the evidence of one may be sufficient to prove it. *Ibid.* 509.
3. Where a legacy for which suit is instituted, is given jointly to several persons in different families, and the legatees take equally, the number in neither family being ascertained by the will, all the claimants ought to be brought before the Court. The right of each individual depends on the number who are entitled, and this number is a fact, which must be inquired into, before the amount to which any one is entitled can be fixed. If this fact were to be examined in every case, it would subject the executors to be harassed by a multiplicity of suits, and if it were to be fixed by the first decree, would not bind persons who were not parties. *Pray et al.* vs. *Belt et al.* 681.
4. The testator in his will says, "whereas my will is lengthy, and it is possible I may have committed some error or errors, I therefore authorize and empower, as fully as I could do myself if living, a majority of my acting executors, my wife to have a voice as executrix, to decide in all cases, in case of any dispute or contention: whatever they determine is my intention, shall be final and conclusive, without any resort to a Court of Justice." Clauses of this description have always received such judicial construction, as would comport with the reasonable intention of the testator. *Ibid.* 679.
5. Even where the forfeiture of a legacy has been declared to be the penalty of not conforming to the injunction of a will, Courts of Justice have considered it, if the legacy be not given over, rather as an effort to effect a desired object, by intimidation, than as concluding the rights of the parties. If an unreasonable use be made of such a power so given in a will; one not foreseen, and which could not be intended by the testator; it has been considered as a case, in which the general power of Courts of Justice to decide on the rights of parties, ought to be exercised. *Ibid.* 680.
6. There cannot be such a construction given to such a clause in a testator's will, as will prevent a party who conceives himself injured by the construction, from submitting his case to a Court of Justice. A Court must decide whether the construction of the will adopted by those who are named is the right construction, or the grossest injustice might be done. *Ibid.* 680.

FINIS.